Jany 21. 1879. Argd N. H. Swayne

9 Otto p 573
Oct. 2. 1878.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 725.

WILLIAM B. ELLIOT, COLLECTOR OF INTERNAL REVENUE,
PLAINTIFF IN ERROR,

vs.

THE EAST PENNSYLVANIA RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF PENNSYLVANIA.

FILED JULY 13, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 725.

WILLIAM B. ELLIOT, COLLECTOR OF INTERNAL REVENUE, PLAINTIFF IN ERROR,

VS.

THE EAST PENNSYLVANIA RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

INDEX.

	Original.	Print.
Writ of error	1	1
Petition of William B. Elliot for certiorari	3	1
Writ of certiorari	5	2

Record of the district court for the city and county of Philadelphia:

	Original.	Print.
Summons	7	3
Narr. and rule to plead	9	4
Appearance for defendant	12	5
Plea	13	5
Trial	14	6
Special venire	15	6
Judgment for defendant	19	7
Order reversing judgment	20	7
Motion for certificate of probable cause	21	8
Motion refused	22	8
Citation	23	8
Certificate of clerk	24	9
Assignment of error	25	9

That your petitioner is an officer of the United States, appointed under and acting by authority of the act of Congress entitled "An act to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes," passed June 30, 1864, and acts in addition thereto and in amendment thereof, to wit, collector of internal revenue of the United States for the first district, for assessing and collecting taxes in the State of Pennsylvania.

That the said suit has been brought against your said petitioner on account of an act done by him under color of his said office as collector; the said suit having been brought by the said plaintiffs to recover back certain moneys paid by the said plaintiffs to the said William B. Elliot, as collector aforesaid, for tax claimed to be due and owing from the said plaintiffs to the United States.

Your petitioner therefore prays that the cause may be entered on the docket of your honorable court, and proceeded in as in a cause originally commenced therein, and that a writ of certiorari be issued by the clerk of your honorable court to the said district court of the city and county of Philadelphia, according to the provisions of the act of Congress in such case made and provided. And he will ever pray, &c.

W. B. ELLIOT.

William B. Elliot, the above-named petitioner, being duly sworn according to law, says that the facts set forth in the foregoing petition are true to the best of his knowledge and belief.

W. B. ELLIOT.

Sworn and subscribed before me this twelfth day of March, A. D. 1874.

W. GRIER HIBLER,
U. S. Commissioner.

I hereby certify that as counsel for the said William B. Elliot, I have examined the proceedings against him, and carefully enquired into all the matters set forth in the foregoing petition, and that I believe the same to be true.

WILLIAM McMICHAEL.

4 (Endorsed:) No. 11. April sessions, 1874. Circuit court of the United States, eastern district of Penn'a. The East Pennsylvania Railroad Company vs. William B. Elliot. Petition of William B. Elliot for removal of cause from the district for the city & county of Philadelphia. Filed March 25, 1874.

Which said petition having been filed, it was ordered by the court here that a writ of certiorari do immediately issue, directed to the district court for the city and county of Philadelphia, which said writ was in the words following, to wit:

5 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, sct:

The President of the United States to the honorable the judges of the district court for the city and county of Philadelphia, greeting:

Whereas lately, in your said district court for the city and county of Philadelphia, of March term, 1874, No. 519, William B. Elliot, of the eastern district of Pennsylvania, was summoned to answer the East Pennsylvania Railroad Company in a plea of trespass on the case, &c.,

which said ,as it is said, is still pending before you in the said district court undetermined; and whereas on the application of the said William B. Elliot to the circuit court of the United States for the eastern district of Pennsylvania, in the third circuit, on a suggestion supported by proper evidence, that the said suit was brought on account of an act done by him under color of his office as collector of internal revenue for the first district, for assessing and collecting taxes in the State of Pennsylvania, the said suit having been brought to recover certain moneys paid by the said plaintiff to the said William B. Elliot, as collector aforesaid for the tax claimed to be due and owing from the said plaintiff to the United States of America, and praying that a writ of certiorari may be immediately issued by the clerk of the said circuit court of the United States, directed to the said district court for the city and county of Philadelphia, to send to the said circuit court of the United States the record and proceedings in the said cause, according to the provisions of the act of Congress in such case made and provided.

Wherefore you are hereby commanded to transmit under your seal the record and proceedings of the said suit, with all things thereunto relating, unto the said circuit court of the United States, to be holden at Philadelphia, for the eastern district of Pennsylvania, in the third circuit, plainly and distinctly, in as full and ample manner as it now remains before you, together with this writ, so that the said circuit court of the United States may be able therein to proceed and do what shall appear of right ought to be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Philadelphia, this 25 day of March, A. D. 187 , and in the ninety-eighth year of the Independence of the United States.

[SEAL.]

SAMUEL BELL,
Clerk of Circuit Court, U. S.

In the district court for the city and county of Philadelphia.

Guren.

THE EAST PENNSYLVANIA R. R. COMPANY
vs.
WILLIAM B. ELLIOT.
No. 519, of March term, 1874.

McMichael.
Mar. 2, 1874. Sum's case. Exit Feb'y 25, 1874.
Re't. 1st Mon. March, 1874. "Served."
Mar. 11, 1874, narr & rule to plead filed.
April 2, 1874, pleas filed.
April 2, 1874, certiorari brought into office from U. S. C. court.
Certified from the records the 6th day of April, A. D. 1874.

[SEAL.]

W. H. BENCKERT,
Pro Proth'y.

7 CITY AND COUNTY OF PHILADELPHIA, *ss:*

The commonwealth of Pennsylvania to the sheriff of Philadelphia County, greeting:

We command you that you summon William B. Elliot, late of your county, so that he be and appear before our judges, at Philadelphia, at our district court for the city and county of Philadelphia, to be holden at Philadelphia, in and for the said city and county of Philadelphia, the first Monday of March next, there to answer the East Pennsylvania Railroad Company of a plea of trespass on the case, etc. And have you then there this writ.

Witness the honorable J. S. Clark Hare, Doctor of Laws, president of our said court, at Philadelphia, the 25th day of February, in the year of our Lord one thousand eight hundred and seventy-eight.

[SEAL.] JA'S B. WEBB,
Pro Prothonotary.

8 (Indorsed:) 519. March term, 1874. The East Penn'a R. R. Co. vs. William B. Elliot. Summons case. James E. Gowen.

Served by leaving a true and attested copy of the within writ at the dwelling house of the def'd't, with an adult member of his family, Feb'y 27, '74. So answers—

JOHN F. POLE,
Dep. Sh'ff.
W. ELLIOTT,
Sheriff.

9 In the district court of for the city and county of Philadelphia, of March term, one thousand eight hundred and seventy-four. No. 519.

PHILADELPHIA CITY COUNTY, *ss:*

William B. Elliot, late of the county aforesaid, was summoned to answer the East Pennsylvania Railroad Company of a plea of trespass on the case, &c. Whereupon the said plaintiff, by James E. Gowen, its attorney, complain for that

10 And also, for that whereas the defendant on the twenty-fourth day of February, in the year of our Lord one thousand eight hundred and seventy-four, at the county aforesaid, was indebted to the plaintiff in fifty thousand dollars, for goods then and there sold and delivered by the plaintiff to the defendant at his request:

And also, in the further sum of fifty thousand dollars, for goods then and there bargained and sold by the plaintiff to the defendant at his request:

And also, in the further sum of fifty thousand dollars, for work then and there done, and materials for the same provided by the plaintiff for the defendant at his request:

And also, in the further sum of fifty thousand dollars, for money then and there lent by the plaintiff to the defendant at his request:

And also, in the further sum of fifty thousand dollars, for money then and there paid by the plaintiff for the use of the defendant at his request:

And also, in the further sum of fifty thousand dollars, for money then and there had and received by the defendant for the use of the plaintiff:

And also, in the further sum of fifty thousand dollars for money found to be due from the defendant to the plaintiff on an account then and there stated between them:

And also, in the further sum of fifty thousand dollars for interest then and there due and payable, for the forbearance by the plaintiff at the defendant's request for moneys before then due and owing from the defendant to the plaintiff.

And the defendant, afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, in consideration of the several last-mentioned premises, respectively then and there promised the plaintiff to pay it the said several last-mentioned moneys respectively, on request; yet the defendant hath disregarded his promises, and hath not paid any of the said moneys, or any part thereof, to the damage of the plaintiff dollars.

And therefore it brings suit, &c.

JOHN DOE,
RICHARD ROE,
Pledges, &c.
JAMES E. GOWEN,
Pl'ff Att'y.

11 (Indorsed:) 519. March T., 1874. District court. The East Pennsylvania Railroad Company vs. William B. Elliot. Filed M'ch 11th, '74. Narr. Enter rule on defendant to plead in eight days or judgment. (See reg.) James E. Gowen, B., pl'ff att'y. To proth'y D. C.

12 D. C., M'ch T., 1874.

EAST PENN'A R. R. CO.
v.
ELLIOT.
} 519.

The party will enter my appearance in the above case for the def'dant.

WILLIAM McMICHAEL,
Per H. P. BROWN.

M'ch 2, 1874.
To Prot'y D. C.

(Endorsed:) 519. M'ch T., 1874. D. C. East Penn'a R. R. Co. v. Elliot. Order for appearance. Filed M'ch 2, '74. William McMichael.

13 D. C., March T., 1874.

THE EAST PENNSYLVANIA R. R. CO.
v.
WILLIAM B. ELLIOT.
} No. 519.

The defendant pleads non assumpsit.
To Proth'y D. C.

WILLIAM McMICHAEL,
Attorney for Defendant.

(Endorsed:) 519. March T., 1874. D. C. E. P. R. R. Co. v. W. B. Elliot. Plea. Filed Ap'l 2, 1874. McMichael.

To the honorable judges within named:

Pleas within mentioned and all things touching the same we certify and send together with this writ.

J. A. CLARK HARE. [SEAL.]
[SEAL.]

14 And now, to wit, on the 24th day of April, A. D. 1874, a jury being called, came, to wit:

1. Theodore Allen.
2. Bently H. Smith.
3. John W. Middleton.
4. William E. Shallenberger.
5. Richard Dale.
6. William D. Gardner.
7. Henry Kanaga.
8. James J. McDowell.
9. Jacob Loudenslager.
10. William Mencke.
11. William B. Knowles.
12. Davis M. Lane.

who are respectively sworn or affirmed to try the issue joined, &c.

And now, to wit, on the 24th day of April, A. D. 1874, the jurors aforesaid, upon their oaths or affirmations respectively, do say that they find—

15 1. That the plaintiff is a railroad company, incorporated under the laws of the State of Pennsylvania, and having its principal office in the first United States internal revenue collection district of said State at the date of the returns and payments hereinafter mentioned.

2. That the defendant was, at the date of the said payments, collector of internal revenue of the United States for the said district.

3. That on the eighteenth day of January, 1870, a dividend of $39,276, being three per cent. on the capital stock of the said company, became due and payable, and was paid to the stockholders of the said
16 company by the Philadelphia and Reading Railroad Company as
rent for the railroad of the said plaintiff, payable for the preceding six months, under the provisions of a lease and contract dated May 19th, 1869, whereby the railroad of the said plaintiff was leased to the Philadelphia and Reading Railroad Company, and the said rent was received and made payable directly by the latter company to the stockholders of the said company plaintiff, without the declaration of any dividend by the directors of the said company plaintiff.

4. That on the fifteenth day of December, 1871, the said company, in accordance with the requirement of the assessor for the said district, made a return (accompanied by a written protest), whereby it appeared that a tax of five per cent. upon the said dividend ($39,276), with the sum of $2,067.16 (five per cent. of a sum of which the said dividend is ninety-five per cent.) added thereto, would amount to $2,067.16.

5. That a list containing said return was duly forwarded by the said assessor to the collector of internal revenue for the said district.

6. That on the twenty-ninth day of July, 1873, the said company paid the said sum of $2,067.16 to the said defendant, then collector as aforesaid, together with alleged penalties, amounting to $475.45 (viz, $103.36, five per cent. on said tax, and $372.01, interest at the rate of one per cent. per month from January 1st, 1872, to July 1st, 1873), making in all the sum of $2,542.61; that said payment was made under compulsion, and was accompanied by a written protest of the company against its liability therefor.

7. That on the sixteenth day of January, 1872, a dividend of $39,276, being three per cent. on the capital stock of the plaintiff, was paid to the holders of the shares of the said capital stock by the Philadelphia and Reading Railroad Company as rent for the preceding six months, under the provisions of the lease above mentioned.

17 8. That on the tenth day of January, 1872, the said company, in accordance with the requirement of the assessor for the said district, made a return (accompanied by a written protest), whereby it

appeared that a tax of two and one-half per cent. upon the said dividend ($39,276), with the sum of $1,007.08 (two and one-half per cent. of a sum of which the said dividend is ninety-seven and one-half per cent.) added thereto, would amount to $1,007.08.

9. That a list containing said return was duly forwarded by the said assessor to the collector of internal revenue for the said district.

10. That on the twenty-ninth day of July, 1873, the said company paid the said sum of $1,007.08 to the said defendant, then collector as aforesaid, together with alleged penalties amounting to $211.48 (viz, $50.35, five per cent. on said tax, and $161.13, interest at the rate of one per cent. per month from March 1st, 1872, to July 1st, 1873), making in all the sum of $1,218.56; that said payment was made under compulsion, and was accompanied by a written protest of the company against its liability therefor.

11. That on the twenty-fifth day of September, 1873, the said company duly presented claims to the Commissioner of Internal Revenue of the United States for refunding the said sums of $2,542.61 and $1,218.56.

12. That on the sixth day of February, 1874, the said claims were rejected by the said Commissioner of Internal Revenue of the United States.

And the said jurors further say, that they are ignorant in point of law on which side they ought, upon these facts, to find the issue; but that if the court shall be of opinion that the plaintiff is entitled to recover the moneys thus paid as aforesaid to the defendant, or any part of them, they find for the plaintiff and assess the damages at such sum as
18 shall be equal to the money thus to be recovered, together with interest at the rate of six per cent. per annum from the date of payment; but that if the court shall be of the opinion that the plaintiff is not entitled to recover the said moneys, or any parte threof, then they find for the defendant.

19 And afterwards, to wit, on the 2nd day of May, A. D. 1877, the case came on for argument on special verdict, and was argued by James E. Gowen for the plaintiff, and John K. Valentine for defendant, and the same was held under advisement by the court.

And afterwards, to wit, on the 22nd day of October, A. D. 1877, the court, having held the same under advisement, order that judgment be entered on the special verdict in favor of the defendant.

And afterwards, to wit, on the 12th day of January, A. D. 1878, the court made the following order, to wit:

20 In the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit. Ap'l sess., sess. 1874.

East Pa R. R. Co.)
v. } No. 11.
Elliot.)

And now, January 12, 1878, on motion of James E. Gowen, esq., attorney for plaintiff (it appearing that notice had been given to the United States attorney for the eastern district of Pennsylvania), the attention of the court having been called to the decision of the Supreme Court of the United States in the case of Erskine vs. The Milwaukee and Saint Paul Railway Company, reported since the argument of the above-entitled case (in 4 Otto (94 U. S. S. C.), page 619), it is ordered that the entry of judgment heretofore made in favor of the defendant upon the special verdict be vacated, and that judgment be entered upon the verdict in favor of the plaintiff, for the sum of $686.93 (being the penalty of five per centum and interest thereon at the rate of one per cent. per month, as mentioned in the said verdict), together with interest thereon from July 29, 1873, 183.64, in all the sum of 870.57.

By the court.

21 And afterwards, to wit, on the 27th day of April, A. D. 1878, the defendant, by John K. Valentine, esq., his attorney, comes into court here and files a motion for certificate of probable cause, which having been read is in the words and figures following, to wit:

C. C. U. S., Ap'l sess., 1874.

East Penn'a R. R. Co.
vs. } No. 11.
William B. Elliot.

And now, April 27, 1878, come John K. Valentine, esq., attorney for the defendant, and states that it appears from the records of the court that the defendant in the above cause, at the time the moneys were received by him for the recovery of which the above suit was brought, was collector of internal revenue for the first collection district of the State of Pennsylvania, and that the said moneys so paid to him by 22 the plaintiff were paid by him into the Treasury in the performance of his official duty, and that in the collection of the said moneys he acted under the direction of the Secretary of the Treasury, and moves the court that it be certified that there was probable cause for the action of the said collector in collecting and receiving the moneys aforesaid.

(Endorsed:) 11. April sess., 1874, C. C. U. S. East Penn'a R. R. Co. vs. William B. Elliot. Motion for certificate of probable cause. Filed Ap'l 27, 1878. Valentine.

And afterward, to wit, on the 1st day of May, A. D. 1878, the motion having been argued by counsel for the respective parties, the court refuse the motion.

23 **The United States of America,** *ss:*

To the East Pennsylvania Railroad Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Pennsylvania, in the third circuit, wherein William B. Elliot is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error mentioned, shall not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness my hand this fourteenth day of May, in the year of our Lord one thousand eight hundred and seventy-eight.

JOHN CADWALADER, ***Judge.***

I accept service for the East Pennsylvania Railroad Company.

JAMES E. GOWEN.

24 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, sct:

I, Samuel Bell, clerk of the circuit court of the United States of America for the eastern district of Pennsylvania, in the third circuit, do hereby certify the foregoing to be a true and faithful copy of the original pleas and proceedings in the case of the East Pensylvania R. R. Company vs. William B. Elliot, No. 11, April sessions, 1874, on file, and now remaining among the records of the said court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this sixth day of July, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of these United States the 103rd.

[SEAL.] SAMUEL BELL,
Clerk of C. C.

25 Supreme Court of the United States. In error.

WILLIAM B. ELLIOT
vs.
THE EAST PENNSYLVANIA RAILROAD COMPANY.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said plaintiff, by John K. Valentine, his attorney, and says that by the record aforesaid it appears that the learned judge of the circuit court erred in entering judgment for the said defendant and against the said plaintiff on the special verdict as found by the jury, whereas by the law of the land the said judgment ought to have been given for the said plaintiff and against the said defendant; and the said plaintiff prays that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he has lost by occasion of the said judgment.

(Indorsed:) Oct. term, 1878. Supreme Court of the United States William B. Elliot, plaintiff in error, vs. The East Penn'a R. R. Co., defendants in error. Assignment in error.

(Indorsement on cover:) No. 725. William B. Elliot, collector of internal revenue, plaintiff in error, vs. The East Pennsylvania Railroad Company. E. Pennsylvania C. C. U. S. Filed 13th July, 1878.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

WM. B. ELLIOT, COLLECTOR,
v.
EAST PENN. R. R. CO.
No. 725.

ERROR TO UNITED STATES CIRCUIT COURT FOR EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR PLAINTIFF IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

WM. B. ELLIOT, COLLECTOR,
v.
EAST PENN. R. R. CO.
} No. 725.

ERROR TO UNITED STATES CIRCUIT COURT FOR EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

The judgment in this case was entered upon this special verdict:

And now, to wit, on the 24th day of April, A. D. 1874, the jurors aforesaid, upon their oaths or affirmations respectively, do say that they find—

1. That the plaintiff is a railroad company, incorporated under the laws of the State of Pennsylvania, and having its principal office in the first United States internal revenue collection district of said State at the date of the returns and payments hereinafter mentioned.

2. That the defendant was, at the date of the said payments, collector of internal revenue of the United States for the said district.

3. That on the eighteenth day of January, 1870, a dividend of $39,276, being three per cent. on the capital stock of the said company, became due and payable, and was paid to the stockholders of the said company by the Philadelphia and Reading Railroad Company as rent for the railroad of the said plaintiff, payable for the preceding six months, under the provisions of a lease and contract dated May 19th, 1869, whereby the railroad of the said plaintiff was leased to the Philadelphia and Reading Railroad Company, and the said rent was received and made payable directly by the latter company to the stockholders of the said company plaintiff, without the declaration of any dividend by the directors of the said company plaintiff.

4. That on the fifteenth day of December, 1871, the said company, in accordance with the requirement of the assessor for the said district, made a return (accompanied by a written protest) whereby it appeared that a tax of five per cent. upon the said dividend ($39,276), with the sum of $2,067.16 (five per cent. of a sum of which the said dividend is ninety-five per cent.) added thereto, would amount to $2,067.16.

5. That a list containing said return was duly forwarded by the said assessor to the collector of internal revenue for the said district.

6. That on the twenty-ninth day of July, 1873, the said company paid the said sum of $2,067.16 to the said defendant, then collector as aforesaid, together with alleged penalties, amounting to $475.45 (viz, $103.36, five per cent. on said tax, and $372.01 interest, at the rate of one

per cent. per month from January 1st, 1872, to July 1st, 1873), making in all the sum of $2,542.61; that said payment was made under compulsion, and was accompanied by a written protest of the company against its liability therefor.

7. That on the sixteenth day of *of* January, 1872, a dividend of $39,276, three being per cent. on the capital stock of the plaintiff, was paid to the holders of the shares of the said capital stock by the Philadelphia and Reading Railroad Company as rent for the preceding six months, under the provisions of the lease above mentioned.

8. That on the tenth day of January, 1872, the said company, in accordance with the requirement of the assessor for the said district, made a return (accompanied by a written protest), whereby it appeared that a tax of two and one-half per cent. upon the said dividend (39,276), with the sum of $1,007.08 (two and one-half per cent. of a sum of which the said dividend is ninety-seven and one-half per cent.), added thereto, would amount to $1,007.08.

9. That a list containing said return was duly forwarded by the said assessor to the collector of internal revenue for the said district.

10. That on the twenty-ninth day of July, 1873, the said company paid the said sum of $1,007.08 to the said defeedant, their collector as aforesaid, together with alleged penalties amounting to $211.48 (viz, $50.35, five per cent. on said tax, and $161.13, interest at the rate of one per cent. per month from March 1st, 1872, to July 1st, 1873), making in all the sum of $1,218.56; that said payment was made under compulsion, and was accom-

panied by a written protest of the company against its liability therefor.

11. That on the twenty-fifth day of September, 1873, the said company duly presented claims to the Commissioner of Internal Revenue of the United States for refunding the said sums of $2,542.61 and $1,218.56.

12. That on the sixth day of February, 1874, the said claims were rejected by the said Commissioner of Internal Revenue of the United States, and the said jurors further say, that they are ignorant in point of law on which side they ought, upon these facts, to find the issue, but that if the court shall be of opinion that the plaintiff is entitled to recover the moneys thus paid as aforesaid to the defendant, or any part of them, they find for the plaintiff and assess the damages at such sum as shall be equal to the money thus to be recovered, together with interest at the rate of six per cent. per annum from the date of payment, but that if the court shall be of the opinion that the plaintiff is not entitled to recover the said money, or any part thereof, then they find for the defendant.

And afterwards, to wit, on the 2d day of May, A. D. 1877, the case came on for argument on special verdict, and argued by James E. Gowen for the plaintiff, and John K. Valentine for defendant, and the same was held under advisement by the court.

And afterwards, to wit, on the 22d day of October, A. D. 1877, the court, having held the same under advisement, order that judgment be entered on the special verdict in favor of the defendant.

And afterwards, to wit, on the 12th day of January, A. D. 1878, the court made the following order, to wit:

In the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, Ap'l sess., 1874.

EAST. PA. R. R. CO.
v.
ELLIOT.
No. 11.

And now, January 12, 1878, on motion of James E. Gowen, esq., attorney for plaintiff (it appearing that notice had been given to the United States attorney for the eastern district of Pennsylvania), the attention of the court having been called to the decision of the Supreme Court of the United States in the case of Erskine *vs.* The Milwaukee and Saint Paul Railway Company, reported since the argument of the above entitled case (in 4 Otto, 94 U. S. S. C., page 619), it is ordered that the entry of judgment heretofore made in favor of the defendant upon the special verdict be vacated, and that judgment be entered upon the verdict in favor of the plaintiff, for the sum of $686.93 (being the penalty of five per centum, and interest thereon at the rate of one per cent. per month, as mentioned in the said verdict), together with interest thereon from July 29, 1873, $183.64, in all the sum of $870.57. (Record, 6 to 8.)

ASSIGNMENT OF ERRORS.

The plaintiffs in error assign for error the rendition of the judgment aforesaid against them in favor of said railroad company, and say that the original judgment in favor of the United States against said corporation was correct, and was required by the law upon the facts established by the special verdict, and that it was not competent for said circuit court to vacate said judgment in favor of the United States at the time it assumed to take such action.

BRIEF.

The decision of this cause, if it touches all the issues believed to be involved and that are herein discussed, will dispose of a number of similar pending cases, no other one of which was thought by counsel upon both sides so fully to present all the topics which are introduced to our consideration by this record.

On the 18th day of January, 1870, there was paid to the stockholders of the East Pennsylvania Railroad Company a three per cent. dividend, amounting to $39,276, for the rent of their road for the preceding six months, under a lease dated May 19, 1869.

January 16, 1872, another dividend of like character and amount was paid as rent for the preceding six months.

Considering the company not liable to pay a tax upon these dividends, no return of them was made by its officers until required to do so, when they returned them under protest, adding to the sums actually divided among its stockholders the amount of the Federal taxes assessed thereon, being five per cent. (or $2,067.16) on that first accruing, and two and a half per cent. (or $1,007.08) on the last.

The first return was thus made under compulsion December 15, 1871, and the second January 10, 1872.

Both assessments were paid July 29, 1873, under protest, with a penalty of five per cent. of the tax additional and interest at the rate of one per cent. a month from January 1 to July 1, 1873, on the $2,067.16, and 5 ~~two and a half~~ per cent. and interest at one per cent. a month from March 1, 1872, to July 1, 1873, on the $1,007.08.

Due proceedings to obtain restitution of the money having been instituted, the questions now arising are whether either tax was lawfully assessed and collected, and, if so, whether in either case the penalty and interest were legally exacted. Different questions are presented as to each tax by reason of the intermediate act of Congress approved July 14, 1870.

I.

The dividend of January 18, 1870, was liable to a five per cent. tax.

1. That the *date* of the declaration and payment did not release it from this liability is too well settled by authority to permit of further argument. (Barnes *v.* Railroads, 17 Wall., 294; Stockdale *v.* Ins. Cos., 20 Wall., 329; Blake *v.* Nat. Banks, 23 Wall., 307; Erskine *v.* Ry. Co., 94 U. S., 620.)

In St. Paul and Milwaukee Ry. Co. *v.* Erskine, No. 179 of October term, 1876, the corporation abandoned its appeal and exceptions which contested the validity of the tax on its coupons falling due January 1, 1870, and only resisted the government's demand (in No. 178 of the same term) for the penalty claimed for non-payment. (Erskine *v.* St. Paul and Milwaukee Ry. Co., 94 U. S., 620, to be hereinafter reviewed.)

2. The fact of the rent being paid to the stockholders of the East Pennsylvania Railroad Company by the Philadelphia and Reading Railroad Company, instead of being semi-annually declared by the directors of the former corporation, cannot affect its liability to taxation. It was a mere accidental circumstance.

The act of June 30, 1864, § 122, as amended by act of July 13, 1866 (13 Stats., 284; 14 *Id.*, 138), subjected to a tax of five per centum ~~on~~ any dividend declared by a company of "part of earnings, profits, income, or gains of such company" * * * "whenever and wherever the same shall be payable."

This payment to the stockholders of the East Pennsylvania Railroad Company was a division of "the earnings, profits, income, or gains of such company," for for the time named.

When the corporation, by its directors and stockholders, assented to a lease of their property upon the terms indicated, they thereby declared the precise amount of income derived from this source which should be paid to them at and for the times prescribed, in return for the use of the road and its appurtenances. It was none the less a semi-annual dividend of income or earnings upon their investment because declared by written instrument and in advance for several occasions, running through a term of years. It came within the meaning, purport, spirit, and even the language of the statute, and obviously within the intent of the legislature.

II.

Was the company liable to pay a five per cent. penalty and interest at the rate of one per cent. a month for failure to pay seasonably this tax of 1870?

An individual citizen would make himself thus liable under similar circumstances.

The act of August 5, 1861, c. 45, under which all income taxes were paid directly by the citizen, inflicted no penalty, but decreed that interest should be paid after the last day of June in each year, and authorized a collection by distraint, &c. (12 Stats., 309, § 49, and 310, § 51.)

The amendatory act of July 1, 1862, c. 119, collected part of the income tax through the intervention of certain corporations, from which it required returns and payments. For failure to make monthly returns of gross receipts, railroads, &c., were liable to pay *five per cent. additional* to the amount ascertained by the assessor to be due from an inspection of their books; and for every attempt to evade the tax $1,000 *penalty was to be paid by every person* (having the care and management of such railroad, &c.) attempting such evasion. (12 Stats., 469, § 80.) The next section (*Id.* pp. 469 and 470, § 81), for the first time, required returns to be made of dividends and interest coupons, and the tax to be paid by the corporation. In case of neglect to make return, *the managers* of the road, and *not the corporation* itself, "shall forfeit, as a penalty, the sum of $500;" and the assessment and collection was to be made "*according to the general provisions of this act.*" (12 Stats., 470, § 81, last clause.)

By section 91 the stock or bond holder was permitted to deduct from the statement of his income those items of dividend and interest. (*Id.*, 474).

Section 92 imposed for a delay of payment for ten days after demand and after July 30 of each year, "the sum of *five* per centum on the amount of duties unpaid, as a penalty, except from the estates of deceased and insolvent persons." (*Id.*, 474, § 81.) Made *ten* per cent. by act of June 30, 1864, c. 173, § 119. (13 Stats., 283.)

Unlike the above-named section 91 of this act of 1862, the act of June 30, 1864, c. 173, § 117 (13 Stats., 281), authorized the taxpayer to deduct from his income return *only* that corporation interest or dividend "which had been assessed and *the tax paid.*" Section 109 of this act of June 30, 1864, provided that "in case of neglect or *refusal to make said lists or returns* [of gross receipts] for the space of ten days after such return should have been made as aforesaid, the assessor or assistant assessor shall proceed to estimate the amount received and the duties payable thereon, and *shall add thereto ten per centum* as hereinbefore provided in other cases of delinquency to make return for purposes of assessment," and it then goes on to give power to the assessor to examine the company's books, &c., in order to make his estimate and assessment. It concludes by declaring that the *managers* of the corporation shall pay another ten per cent. penalty for delay in paying the assessment, and for any attempt knowingly to evade the payment "shall be liable to pay a penalty of one thousand dollars for every such attempt." (13 Stats., 277.)

This act, it will be seen, imposed different penalties and upon different parties for omission to make prescribed returns and for neglect of payment, or its willful evasion.

Like individuals, corporations paid ten per cent. additional for failure to make return of *its* income, or gross receipts; but for delay in paying, *the officers* paid another ten per cent., and the pecuniary fine of $1,000 was imposed on them for a willful violation of law, because that is a personal and moral wrong; while the stockholder could not deduct the dividend from his income return unless the tax thereon had been paid. Section 122 of the act of June 30, 1864, also imposed a forfeiture as a penalty of $1,000 on the company neglecting to make return of, or to pay the tax on, dividends and interests, and added that the assessment and collection in such case should be "according to the provisions of law in other cases of neglect." (13 Stats., 285.)

That entire section, as amended by the act of July 13, 1866, § 9, is as follows:

"That any railroad, canal, turnpike, canal navigation, or slack-water company, indebted for any money for which bonds or other evidence of indebtedness have been issued, payable in one or more years after date, upon which interest is stipulated to be paid, or coupons representing the interest, or any such company that may have declared any dividend in scrip or money, due or payable to its stockholders, including non-residents, whether citizens or aliens, as part of the earnings, profits, income, or gains of such company, and all profits of such company carried to the account of any fund, or used for construction, shall be subject to and pay a tax of five per centum on the amount of all such interest, or coupons, dividends, or profits, whenever and wherever the same shall be payable, and to whatever party or person the same may be payable, including non-residents, whether citizens or aliens; and said companies are hereby authorized to deduct and withhold from all payments on account of any interest, or coupons, and dividends, due and payable as aforesaid, the tax of five per centum; and the payment of the amount of said tax so deducted from the interest, or coupons, or dividends, and certified by the president or treasurer of said company, shall discharge said company from that amount of the dividend, or interest, or coupon, on the bonds or other evidences of their indebtedness so held by any person or party whatever, except where said companies may have contracted otherwise. And a list or return shall be made and rendered to the assessor or assistant assessor, on or before the tenth day of the month following that in which said interest, coupons, or dividends become due and payable, and as often as every six months; and said list or return shall contain a true and faithful account of the amount of tax, and there shall be annexed thereto a declaration of the president or treasurer of the company, under oath or affirmation, in form and manner as may be prescribed by the Commissioner of Internal Revenue, that the same contains a true and faithful account of said tax. And for any default in making or rendering such list or return, with the declaration annexed, or of the payment of the tax as aforesaid, the company making such default shall *forfeit*, as a penalty, the sum of one thousand dollars; and in case of any default in making or rendering said list or return, or of the payment of the tax or any part thereof, as aforesaid, the assessment and collection of the tax and penalty shall be made according to the provisions of the law in other cases of neglect or refusal: *Provided*, That whenever any of the companies mentioned in this section shall be unable to pay the interest on their indebtedness, and shall, in fact, fail to pay such interest, that in such cases the tax levied by this section shall not be paid to the United States until said company resume the payment of interest on their indebtedness." (14 Stats., 138, 139.)

By the act of July 14, 1870 (c. 255, § 17), the foregoing section was "construed to impose the taxes therein mentioned to the first day of August, 1870," and continues all liens, penalties, and forfeitures accrued or incurred under or by virtue thereof. (16 Stats., 261, § 17; Stockdale *v.* Ins. Cos., 20 Wall., 323.)

The language relating to the question at issue is this: "And for any default in making or rendering such list or return, with the declaration annexed, or of the payment of the tax as aforesaid, the company making such default shall *forfeit* as a penalty the sum of one thousand dollars; and in case of any default in making or rendering said list or return, or of the payment of the tax or any part thereof as aforesaid, the assessment and collection of the tax and penalty shall be made according to the provisions of law in other cases of neglect or refusal."

It will be observed that the $1,000 above mentioned is expressly referred to as a *forfeiture*—a pecuniary forfeiture—none the less such because it is followed by the expression "as a penalty," and as such a forfeiture could be collected only *by suit*, not by the "assessment and collection" referred to in section 122. This is an important consideration, in view of the otherwise anomalous character of the provision following this forfeiture: "And in case of any default in making or rendering said list or return, or of the payment of the tax or any part thereof, as aforesaid, the *assessment and collection of the tax and penalty shall be made according to the provisions of law in other cases* of neglect or refusal.

The penalty last referred to is obviously that which may be "assessed [in default of return] and collected [in default of payment] *with the tax*."

The pecuniary forfeiture of $1,000, above mentioned, cannot be so assessed or collected. See section 41 of the act of June 30, 1864, as amended by act of July 13, 1866 (14 Stat., p. 111), providing "that it shall be the duty of the collectors * * * to prosecute for the recovery of any sum or sums which may be forfeited by law." And it is to be noted that both sections 41 and 122, as here given, are really parts of the same statute. Act of July 13, 1866, section 8, which section amended and re-enacted both sections 41 and 122.

It is also noteworthy that section 179 of the act of June 30, 1864, as amended by the same act of July 13, 1866 (14 Stat., 145), *also repeats* the enactment that "it shall be the duty of the collectors in their respective districts, and they are hereby authorized, to *prosecute* for the recovery of *any sum* or sums that may be forfeited."

For substantially similar pecuniary forfeitures, see, as examples, section 38 of the same act of July 13, 1866 (14 Stat., p. 160); R. S., section 3235; section 32 of the act of July 20, 1868 (15 Stat., p. 139); R. S., section 3276 (two instances in this one section); section 39 of said act of July 20, 1868 (15 Stat., 141); R. S., section 3326, and section 40 of same act (15 Stat., 141).

Now, when we find that in each of the cases of default provided for in sections 122 and 16 aforesaid there is "according to the provisions of law in other cases of neglect or refusal," a penalty which can be assessed and collected in the one case, and collected without assessment, but on computation by the collector in the other case, but in both cases *with the tax*, and *proportioned* thereto, all difficulty of construction of the provision in question, as to both sections 122 and 16, is removed, and we see at once that the $1,000 *forfeiture* penalty is *in addition* to the *appropriate penalties incident* to default in making return for, or in payment of, taxes under the *general provisions* of law.

That the $1,000 forfeiture penalty provided in section 122 of the act of June 30, 1864, was *additional* to the ten-per-centum penalty provided in the preceding twenty-eighth section of the same act (which ten-per-centum penalty became afterward the penalty of five per centum and interest), is declared by the following provision of section 49 of said act of June 30, 1864 (13 Stat., p. 241), which section is interposed, as its number indicates, between the aforesaid sections 28 and 122, "That *all the provisions hereinafter made* for the delivery of returns, and for additions to the duty in case of * * * * *refusal or neglect* to deliver lists or returns, and for the imposition of fines, penalties, and forfeitures, shall be held and taken to apply to all persons, associations, *corporations*, or *companies* liable to pay duty or tax; and any additions to duties, fines, *penalties*, or *forfeitures hereinafter imposed* for failure to perform any duty required to be performed, *shall be held and taken* to be *additional to those hereinbefore provided*."

Now, what were the general "provisions of law in other cases of neglect or refusal" to which reference is made in the closing sentence of both sections 122 and 16 aforesaid?

1st. As to failure to *make or render the list or return*. Section 14 of the act of June 30, 1864, as amended by the act of July 13, 1866 (14 Stat., p. 101), provides that "if any person,* without notice, * * * "shall not deliver a *monthly* or *other list* or *return at the time required by law*, * * * it shall be lawful for the assessor to summon such person," &c. Then follow detailed provisions enabling the assessing officer to get at the facts of the liability to tax, and the section proceeds to provide that "It shall be the duty of the assessor * * * to make * * * such list or return * * * and assess the tax thereon * * * and in case of a refusal or neglect * * * to make a list or return, or to verify the same as aforesaid, he *shall add fifty per centum* to such tax.

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*Section 82 of act of June 30, 1864 (13 Stat., p. 258), expressly makes this word "person" "to mean and include * * * associations or corporations."

This is, in effect, a penal assessment for neglect or refusal to make a return, and by section 122 aforesaid, as well as by section 16 aforesaid, is applied to the case of a refusal or neglect to make the return required from the railroad corporations by those sections respectively, which assessments have been frequently made in such cases, and the power to make them has never been successfully controverted.

2d. As to *default in payment of the tax*, section 28 of the act of June 30, 1864, as amended by the act of July 13, 1866 (14 Stat., p. 106), provides as follows (clearly covering the cases in question): "And with respect to *all such taxes as are not included in the annual lists aforesaid, all taxes* the collection of which is *not otherwise provided for* in this act, it shall be the duty of each collector, in person, or by deputy, to give notice and demand payment thereof, in the manner last mentioned, within ten days from and after receiving the list thereof from the assessor, or within twenty days from and after the expiration of the time within which such tax should have been paid; and if the annual *or other* taxes shall not be paid within ten days from and after such notice and demand, it shall be lawful for such collector, or his deputies, to proceed to collect *the said taxes, with ten per centum additional thereto*, as aforesaid, by distraint and sale," &c.

Section 11 of the act of July 13, 1866 (14 Stat., p. 150), provides that all returns required to be made monthly shall be made on or before the 10th day of each month, and the tax thereon certified by the assessor to the collector on or before the last day of the month; and it then provides that "all lists or returns required to be made quarterly, and all other lists or returns for which no provision is *otherwise* made, shall be made on or before the 10th day of each and every month in which said list or return is required to be made, or succeeding the time when the tax may be due and liable to be assessed, and the tax thereon shall be certified or returned as herein provided for monthly lists or returns. And the tax shall be due and payable on or before the last day of each and every month. And in case said tax is not paid on or before the last day of each and every month, the collector shall add ten per centum thereto. * * * And in *all cases of neglect to make such lists or returns*, or in case of false and fraudulent returns, *the provisions of existing law as amended by this act shall be applicable thereto.*"

It will, no doubt, be contended that this section does not apply to the case of default in payment of dividend, &c. Whether it does apply or not is unimportant, unless on the assumption that section 28 aforesaid of the act of June 30, 1864, amended, does not apply. If, as we contend, *that section clearly does apply*, then it is unimportant whether section 11 applies, say as an alternative provision, either of which (it or section 28) could be acted on. If, on the contrary, section 28 did not (as it does) apply, then section 11 would certainly apply; for without one or the other of the two sections (28 or 11), *there would be no provision of law fixing the time when the dividend tax was due;* and it is obvious that section 11 was so prepared as to be intended to cover every case not provided for by section 28, and especially to define when taxes should be due and payable. Now, this section 11 provides that "the tax shall be due and payable on or before the last day of each and every month." Section 28 provided that as to "all such taxes as are not included in the annual lists aforesaid, all taxes the collection of which is not otherwise provided for in this act," the tax should be collected, with 10 per cent. additional thereto, by distraint, *if the taxes were not paid "within ten days from and after notice and demand."* This clearly covers the dividend taxes, as before contended. But if section 11 is regarded as also covering such taxes, it *fixes a definite time* when the taxes should be regarded as due, viz, the last day of the month; and it was required that *if not paid then* "the collector *shall* add ten per centum thereto." *To that extent* this is a modification of the provisions of section 28.

The analysis of this section 11, by Mr. Gowen, before referred to, errs, it seems to me, in its taking "*elsewhere*" as the necessary meaning of the word "otherwise," in the expression "for which no provision is *otherwise* made." A truer definition is that given by Webster: "Otherwise—In a *different* manner"; and the more correct meaning of the expression is, therefore, "for which no provision is *in a different manner* made."

Now, the fact is that the provision made in section 122, as amended by this same act of July 13, 1866, of which section 11 is part, was that "a list or return shall be made and rendered * * * on or before the tenth day of the month following that in which said interest, coupons, or dividends become due and payable." This obviously is not providing *in a different manner* for that which is similarly provided for in the general provisions of section 11.

It would seem, therefore, that section 11 may be held to apply, as also section 28 modified thereby.

Section 28 aforesaid, as amended July 13, 1866, further provides that "if any person, bank, association, company, or corporation, liable to pay any tax, shall neglect or refuse to pay the same after demand, the amount shall be a lien in favor of the United States from the time it was due until paid, with the interest, *penalties*, and costs that may *accrue in addition thereto*, upon all property and rights to property, &c."; "and the collector after demand may levy * * * upon all property," &c., "for the payment of the sum due as aforesaid, with interest and *penalty for non-payment*, and also for such further sum as shall be sufficient for the fees, costs, and expenses of such levy."

The ten per centum penalty provided by sections 11 and 28, aforesaid, was changed by section 8 of the act of March 2, 1867 (14 Stat., 473), which provided, "That hereafter for any failure to pay any internal-revenue tax at the time and in the manner required by law, where such failure creates a liability to pay a penalty of ten per centum additional upon the amount of tax so due and unpaid, the person or persons so failing or neglecting to pay said tax, instead of ten per centum as aforesaid, shall pay a penalty of five per centum, together with interest at the rate of one per centum per month upon said tax from the time the same became due, but no interest for any fraction of a month shall be demanded."

The foregoing, the Internal Revenue Office has always regarded as "the provisions of law in other cases of neglect or refusal," "according to" which, by the express provision of section 122, as aforesaid, "the assessment and collection[1] shall be made."

The original enactment, afterward embodied in section 122, with some modification, was section 81 of the act of July 1, 1862 (12 Stat., p. 469), the language of which, as

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~~[1] The words "of the tax and penalty" are not here.~~

to the matter in question, is as follows: "And for any default in the making or rendering of such list or return, with the declaration annexed as aforesaid, the person or persons owning, possessing, or having the care or management of such railroad company or railroad corporation making such default, shall *forfeit*, as a penalty, the sum of five hundred dollars, and in case of any default in making or rendering said list, or of any default in the payment of the duty, or any part thereof, accruing or which should accrue, the assessment and collection* shall be made according to the general provisions of this act."

It will be observed that this act (the same in this respect as section 16 of the act of July 14, 1870) does not impose the *forfeiture penalty* for default in making *payment*, but remits that "to the general provisions" of the act.

Now, we find those general provisions in section 19 of the same act (12 Stat. p. 439), substantially the same with those of section 28 aforesaid of the act of June 30, 1864, as amended, including the preliminary recital "and with respect to all such duties or taxes as are not included in the annual lists aforesaid, and all taxes and duties the collection of which is not otherwise provided for in this act," the provision for demand of payment, and the enactment that "if the annual and *other duties* shall not be paid within ten days from and after such demand therefor, it shall be lawful for such collector or his deputies to proceed to collect the said duties or taxes, *with ten per centum additional thereto*, as aforesaid, by distraint," &c.

Can there be any doubt that the language of section 81 authorized and required the collection from railroad corporations, in case of default of payment of their divi-

* Words "of the tax & penalty" not here

dend tax, of the "ten per centum additional thereto," as required in the above quoted "general provisions of" the act of 1862?

Without such construction there was no penalty or punishment whatever provided for a railroad corporation for default in payment of its tax. That this was so meant by Congress cannot be seriously contented.

If this construction, giving force to the reference "to the general provisions of this act" as ~~to~~ including the ten per centum penalty, as part of those general provisions, was correct, then it follows that *the precisely similar terms of reference to general provisions*, contained in section 122 and section 16 aforesaid, should be construed in the same manner.

The addition in those sections of the words "of the tax and penalty" after "collection" was obviously a mere amplification, and could not have been intended to restrict or qualify the provision. Those words were probably added because it was thought, by the reviser of section 81 for incorporation into the general internal-revenue act of June 30, 1864, that there should be some words to follow "the assessment and collection" so as to indicate *of what;* and the words "of the tax and penalty" were added, referring doubtless simply to the tax and the *appropriate* penalty, the well-known *ten per cent.* penalty for non-payment of taxes—overlooking, as is sometimes done by inadvertence, in amending one part of a statute only, the word "penalty" previously used; or, it may well have been thought, as that penalty was expressly stated as a *forfeiture*-penalty, that it could not be confounded with the ten per centum penalty intended to be referred to in direct connection with the tax, and which by reason of its being simply a *per centum "penalty"* was directly related to the tax, ~~which~~ while the $1,000 *forfeiture*-penalty was not.

Again. To hold that the $1,000 forfeiture-penalty is all the penalty that is imposed for non-payment by a corporation, under section 122, involves these two anomalies: First, as hereinbefore stated, that in that case the "penalty" following the word "tax" must be held to refer to the $1,000, and so that $1,000 *forfeiture* is to be assessed and collected. No such idea is to be found elsewhere in the internal-revenue laws, and it is in fact incongruous with all other provisions of the laws relating to assessment and collection. All *sums forfeited* must be *prosecuted for* by the collector as provided by sections 41 and 179 aforesaid.

This seems to strongly indicate that such could not have been the intention of the words used, especially as the other construction, which we contend for, makes this provision of the *forfeiture*-penalty in perfect harmony with all other provisions of the internal-revenue laws: *i. e.*, the forfeiture-penalty is to be sued for, if not paid voluntarily; and the *penalty* directly connected with the tax—"*tax and* penalty"—is the penalty of ten per centum (afterward made 5 per cent. and interest at rate of 1 per cent. per month), and is to be collected by the collector as provided by the general provisions of the law in other cases of neglect or refusal to pay taxes.

Further. The other construction would involve this anomaly and injustice, that while an individual citizen who fails to pay his income or other taxes is liable to pay, through the penalty of five per cent. and the one per cent. per month interest, perhaps thousands of dollars for delay in payment of his taxes, the railroad corporation, however large the amount it fails to pay, and however long it may delay payment, for years, perhaps, escapes *without any penalty* whatever, if the case is under the act of July 14, 1870, and only $1,000 if under the act of June 30, 1864.

III.

This protracted discussion is rendered necessary now by reason of insufficient consideration of the question, and inattention to the provisions of law really applicable in the case of Erskine *v.* Milwaukee & St. Paul Railway Co. (94 U. S., 619, 620.) This cause was No. 178 upon the docket of this court for the October term, 1876. By reference not only to the opinion but to the original record, transcript, and brief of counsel, it will be seen that the attention of the court and parties was *wholly* and erroneously directed to amended section 119 of the act of June 30, 1864 (13 Stats., 283, and 14 *Id.*, 480), as the one under which the additional five per cent. penalty and interest at one per cent. a month could be collected of a delinquent railroad company. The Internal Revenue Bureau has always held (in accordance with the views of this court in Erskine *v.* R. R. Co., 94 U. S., 620) that section 119 applied only to individual incomes. The sections which that office has always considered as applicable to corporations, and which we now respectfully suggest as authorizing the collection of the five per cent. and interest penalty, are section 8 of the act of March 2, 1867 (14 Stats., 473), section 28 of the act of June 30, 1864, as amended (*Ib.*, 106), and section 11 of the act of July 13, 1866 (*Ib.*, 150), these being "the provisions of law in other cases of neglect and refusal" referred to in section 122 of the act of June 30, 1864, as amended. These provisions have been hereinbefore fully and sufficiently recited and discussed.

IV.

The second tax was authorized because the dividend was of earnings "for and during the year 1871," made liable to assessment by the act of July 14, 1870, § 15 (16 Stats., 260).

This question, which seems too plain for argument, is not now open, because the verdict and judgment was only for the per centum penalty, and one per cent. interest monthly; the original plaintiffs taking no appeal or writ of error, and therefore not being in a condition, if disposed, to assign errors or question the validity of this tax.

V.

If the tax is valid, what was the proper penalty *under this act of July* 14, 1870, § 16, which is the only statute applicable to this case for failure to pay it?

Erskine's case does not affect this inquiry, because that arose under the different language of an earlier statute, to wit, the act of June 30, 1864, § 122, as amended; which has been hereinbefore fully considered and discussed.

Thus it will be seen that the liability to pay the ~~two and one half~~ 5 per cent. penalty, and one per cent. a month interest upon the second-mentioned assessment, arises under a later statute than that under which five per cent. and the one per cent. a month was assessed as to the first dividend.

Section 16 of the act of July 14, 1870 (16 Stat., p. 260), like the original of the provision, sec. 81 of the act of July 1, 1862, aforesaid, provided in itself *no* specific forfeiture-penalty for *default in the payment of the tax*, but confined the forfeiture to the case of *default in making or rendering the return.* Its language is as follows:

"And for any default in the making or rendering of such return, with such declaration annexed, the corporation so in default shall *forfeit*, as a penalty, the sum of one thousand dollars; and in case of any default in making or rendering said return, *or of any default in the payment of the tax as required*, or of any part thereof, the assessment and collection of the tax and penalty shall be in accordance with *the general provisions* of law *in other cases of neglect and refusal*."

It will be observed that no question of cumulative penalty arises here. *This section provides no other penalty for default in the payment of tax than the five per cent. and interest* embraced "in the general provisions of law in other cases of neglect and refusal." If it does not provide *that penalty* it *provides none*, and if it provides none, then this manifest inequality follows: that no punitive means whatever were provided for enforcing payment of taxes by railroad corporations, while individual citizens were subjected to the penalty of five per cent. and interest. It is not to be presumed that Congress meant to provide this special and invidious *immunity to corporations* from penalties imposed in precisely similar cases upon all other tax-payers.

This could not have been intended, nor is it in accordance with the provisions of the statute as correctly interpreted. When this section 16 says that in case "of any default in *the payment of the tax* as required * * * the assessment and *collection* of the *tax and* penalty shall be in accordance with the general provisions of law in *other cases* of *neglect and refusal*," the word "penalty" here must mean the five per cent. penalty and interest, for that is the *only penalty that can attach.* It is that only which attaches to "other cases." And if this is the true construction of section 16, as to the reference intended by the words "tax and penalty," then it is evident that the same interpretation should be given to the same words "tax and penalty," used in *the same connection* in section 122 of the act of 1864.

Hence the decision of the Supreme Court in the Erskine case (94 U. S., 619), before referred to, cannot be regarded as affecting cases arising under the act of 1870, section 16 aforesaid, because it was made upon a materially different statute, as just shown.

Nor should that decision be regarded, even as to cases arising under said section 122 of the act of 1864, as being conclusive, because neither the Supreme Court nor the circuit court had called to their attention the "general provisions of law" referred to in both sections 122 of 1864, and 16 of 1870, but were referred, by counsel on both sides, only to a certain special provision in section 119 of the act of 1864, which confessedly related to default in the payment of the individual income tax.

There is no reason for imposing much the heavier penalty upon natural persons only, and allowing corporations with enormous incomes to delay the government for years at an expense or penalty of only $1,000; whereas it would be very proper to impose this sum as an *additional* penalty upon such bodies, since they could not have the same excuse for an inadvertent delay that an individual might, there always being the proper officers at the corporate place of business having access to those books and documents which must be resorted to in order to make out the returns required by law.

VI.

The entry of judgment for the collector, made October 22, 1877 (Record, 7, fol. 19), concluded all that had to be done by the circuit court in the premises.

The verdict was rendered at the *April* term, 1877, of the circuit court.

Judgment could only be entered thereon at that same term.

In October, 1877, another term commenced. If judgment could have been entered at all October 22, 1877, it must have been as of the April term and *final*. Another term having supervened, the judge had no more power over that judgment, for any supposed *mistake of law*, where, indeed, none existed, than had any other person. (U. S. *v.* Moss, 6 Howard, 37; Cameron *v.* McRoberts, 3 Wheaton, 593; McMicken *v.* Perin, 18 Howard, 507; Ex p. Lange, 18 Wallace, 167.)

The order vacating the original judgment is entitled as of the April term, although issued after the day fixed by law for beginning the October term.

VII.

The discretion exercised in granting a certificate of probable cause is a judicial discretion, and reviewable here. In this case the collector was entitled to it. It is to be given under suitable circumstances in internal-revenue cases. (R. S., sec. 989.)

CHARLES DEVENS,
Attorney-General.
EDWIN B. SMITH,
Assistant Attorney-General.

No. 725. October Term, 1878.

In the Supreme Court of the United States.

◆

WILLIAM B. ELLIOTT,

Plaintiff in Error and Defendant below,

vs.

THE EAST PENNSYLVANIA RAILROAD COMPANY,

Defendant in Error and Plaintiff below.

◆

Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

◆

BRIEF ON BEHALF OF THE DEFENDANT IN ERROR.

◆

JAMES E. GOWEN,
For Defendant in Error.

Allen, Lane & Scott, Printers, 233 South Fifth Street, Philadelphia.

In the Supreme Court of the United States.

William B. Elliott, Plaintiff in Error and Defendant below, vs. *The East Pennsylvania Railroad Company, Defendant in Error and Plaintiff below.*	October Term, 1878. No. 725.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

The first question presented by this record is whether the omission to pay punctually the taxes on dividends imposed by the internal revenue law, as it existed before the passage of the act of July 14th, 1870, entitled "An act to reduce taxes and for other purposes" (16 Statutes at Large, page 256), subjected the defendant in error to a penalty of five per cent. on the principal of the said tax, and interest on the said principal at the rate of one per cent. a month.

This question, as applicable to railroad companies generally, was decided negatively in the case of Erskine *vs.* The Milwaukee and St. Paul Railway Company, 96 U. S. Repts., page 619.

It was there held that "a penalty of $1000 is the only liability incurred by a railroad company for failing to comply with the provisions of sec. 121 of the internal revenue act of June 30th, 1864 (13 Stat., 284), as amended by the act of July 13th, 1866 (14 *id.*, 138)."

This decision was by an unanimous court, and it has not since been restricted or qualified. It was the only question in the case, and was argued nominally for a collector of internal revenue, but really on behalf of the Commissioner of Internal Revenue by the Assistant Attorney-General. The subject was not a novel one. The final decision of this court, in the cases of Barnes *vs.* The Railroad Companies, 17 Wallace, 294, had subjected a large number of corporations to claims for penalties for omission to pay taxes which had not been collected from stockholders and creditors, under a view of the law which, although finally declared to be erroneous, had been taken by a number of the Circuit Courts, and had for a period the sanction of at least a formal decision of this court.

The extreme hardship of imposing penalties for a most excusable misunderstanding of the law as to the tax-collecting obligations of certain corporations, led to an earnest discussion with the internal revenue office of the very question determined in Erskine *vs.* The Railway Company.

Under these circumstances, there is no reason why the decision referred to should be questioned by the Commissioner of Internal Revenue. No motion for a re-argument appears to have been made; and it is respectfully submitted that it is not in accordance with the practice of the court to listen to a re-argument by the same litigant in another case.

Besides, the abstract question sought to be re-opened is not presented by this record.

The defendant in error paid no dividends and consequently had neither authority nor opportunity to retain from its stockholders the tax, which by the one hundred and twenty-second section of the act of June 30th, 1864

(13 Stat., 284), as amended by the ninth section of the act of July 13th, 1866 (14 Stat., 138), was required to be deducted and withheld from dividends. The tax was a tax upon the stockholders and not upon the corporation.

U. S. *vs.* The Railroad Company, 17 Wallace, 322.

It is not pretended that the stockholders of the East Pennsylvania Railroad Company enjoyed any exemption from income tax, and none was claimed for them. The tax was paid, and if not paid would have been collectible either from the Philadelphia and Reading Railroad Company, the lessee of their road, or from the stockholders themselves, as part of their annual income tax. But it is contended that in any view of the law the defendant in error was not subject to any penalty for its omission to exercise a tax-collecting function with which it was not invested.

Assuming, however, that the defendant in error stood in the same position as any railroad company declaring and paying its own dividends, and that the decision in Erskine's case is open to attack, counsel for the defendant in error is obliged to guess at the manner in which the attack is to be made.

It may be inferred from the opinion of the court that the one hundred and nineteenth section of the act of June 30th, 1864 (13 Stat., 283), as subsequently amended, was relied upon by the counsel for the United States as justifying the imposition of the penalty of five per cent. and interest at the rate of one per cent. a month.

This one hundred and nineteenth section, as finally amended by the act of March 2d, 1867, section 13 (14 Stat., page 480), reads as follows:—" That the taxes on incomes herein imposed shall be levied on the first day of March, and be due and payable on or before the thirtieth day of April in each year, until and including the year eighteen hundred and seventy, and no longer; and to any sum or sums annually due and unpaid after the thirtieth of April, as aforesaid, and for ten days after notice and demand thereof by the collector, there shall be levied in addition thereto the sum of five per centum on the amount of taxes imposed, and interest at the rate of one per centum per month upon the said tax from the time the same became due, as a penalty, except from the estates of deceased, insane or insolvent persons: *Provided*, That the tax on incomes for the year 1866 shall be levied on the day this act takes effect."

If this section alone was relied upon, it must have been because no other was deemed worthy of mention. And yet the section referred to does not sustain the case of the United States. This court so held in Erskine's case, where it was decided that the penalty mentioned was applicable only to an omission to pay the income tax personally chargeable against tax-payers. No ingenuity can elicit from the language used any intent that this penalty should be superadded to the specific penalty of $1000 imposed by the one hundred and twenty-second section of the act of 1864, for the non-payment by corporations of the income tax chargeable against dividends or interest paid by them. Besides, liability for taxes and, *a fortiori*, for penalties for the non-payment of taxes must be found in the clear expression of the legislative will. "If there is a doubt," says Mr. Justice Hunt, in United States *vs.* Isham, 17 Wallace, 504, "as to the liability of an instrument to taxation, the construction is in favor of the exemption, because, in the language of Pollock, C. B., in Girr *vs.* Scudder (11 Exch., 191), 'a tax can not be imposed without clear and express words for that purpose.'" (See, also, Conroy *vs.* Warren, 3 Johnson's Cases, 259.)

It is not necessary to inquire why Congress thought fit to impose a penalty of five per cent., and interest at the rate of one per cent. a month, for the omission to pay the income tax collectible directly from the tax-payers, and a penalty of $1000 for the omission to pay the income tax collectible through the agency of corporations.

The thought that underlies the suggestion of such an inquiry is that the latter penalty is lighter than the former. But probably it was not so considered when the act of 1864 was passed, and it may well be doubted whether such has been the result in practice.

It is to be remembered, too, that the penalties were intended for offenses of different character—one for delay in the payment of a tax chargeable against a delinquent tax-payer, the other for delay in returning a tax chargeable against a tax-collector, since it is no longer open to question that the corporations mentioned in the one hundred and twenty-second section of the act of 1864 were to be collections of taxes from their stockholders and creditors, and not tax-payers themselves. (United States *vs.* The Railroad Company, 17 Wallace, 322.)

The duty of the corporations referred to was in this respect precisely similar to that imposed by the one hundred and twenty-third section of the act of 1864 upon "all pay masters and all disbursing officers under the Government of the United States, or in the employ thereof," who were required to deduct the income tax from salaries paid by them (13 Stat., 285; 14 *id.*, 139 and 480); and yet no penalty whatever was prescribed for a failure to perform this duty.

In fact, the act of 1864, as originally passed, plainly contemplated that the general income returns should include income from dividends and interest paid by corporations, when this latter income had not already been assessed, and the tax thereon actually paid. (Seventeenth section of the act of 1864, 13 Stat., 281.)

If, then, authority for the imposition of the penalty of five per cent., and interest at the rate of one per cent. a month, is not found in the one hundred and nineteenth section of the act of 1864, where is it to be found?

Certainly not in any other of the sections of the act of 1864, which, beginning with the one hundred and sixteenth, and ending with the one hundred and twenty-third, relate to income tax, and are grouped together under the head of "Income."

As these sections cover the whole subject of income tax, we would naturally expect to find in them every penalty for non-compliance with the different provisions of the law relating to the return or payment of income tax; and we do find that the one hundred and twenty-second section expressly provides that "for any default in making or rendering such list or return (*i. e.*, of taxes on corporate dividends or interest) with the declaration annexed or of the payment of the duty aforesaid, the company making such default shall forfeit, as a penalty, the sum of one thousand dollars, and in case of any default in making or rendering said list or return or of the payment of the duty or any part thereof as aforesaid, the assessment and collection of the duty and penalty shall be made according to the provisions of law in other cases of neglect or refusal." 13 Stat., page 285.

This language is unequivocal. There is neither occasion nor opportunity for any rule of construction by which a meaning different from that plainly expressed can be extracted. No other penalty than that of $1000 is menmentioned; and where the very sentence which imposes the penalty provides that the penalty to be collected was the penalty imposed and no other.

It was so held in Erskine's case; and it is presumed that the plaintiff in error in the present case will admit that the penalty imposed by the one hundred and twenty-second section was collectible under the same section. But probably he will contend that the $1000 penalty was cumulative, and that it was to be superadded to another penalty (*i. e.*, that of five per cent. and interest at the rate of one per cent. a month).

This construction is obviously inconsistent with the words and context of the section. But one penalty is imposed, and that penalty is the one which is to be collected. Some other section of the internal revenue law which, of itself and independently of the one hundred and twenty-second section of the act of 1864, imposes the penalty of five per cent. and interest at the rate of one per cent. a month, must be found.

Prima facie, it seems strange that we should be expected to search through the labyrinth of the entire internal revenue law for this penalty. There are so many different subjects of taxation and so many different processes of collection that great embarrassment must necessarily result from any attempt to follow any other clue than that suggested by the arrangement and collocation of the law itself. Income tax is a separate department, containing its own rules and its own penalties. Returns of income for taxation are to be made in certain ways and at certain times, and specific penalties are imposed for failure or neglect to make returns or pay the taxes. In other departments of the law provision is made for other returns, other modes of payment and other penalties. It would be absurd to say that these varying systems are all applicable to the same subjects. No one has yet pretended that the penalties prescribed for the non-return or non-payment of general income tax are supplementary to the previously-prescribed penalties for the non-return or non-payment of other taxes, or even that income-tax payers, who were exempt from the former penalties for any reason, became thereby subject to the latter.

But apart from this, the defendants in error allege that the penalty in question is not imposed upon them by any section of the internal revenue law.

It must be premised that the eighth section of the act of March 2d, 1867 (Stat., vol. xiv., page 473), provided as follows:—

That hereafter for any failure to pay any internal revenue tax at the time and in the manner required by law, where such failure creates a liability to pay a penalty of ten per centum additional upon the amount of tax so due and unpaid, the person or persons so failing or neglecting to pay said tax, instead of ten per centum as aforesaid, shall pay a penalty of five per centum, together with interest at the rate of one per centum per month upon said tax, from the time the same became due, but no interest for any fraction of a month shall be demanded.

(At the cost of a digression from the line of argument, the defendants in error beg leave to call the attention of the court to the fact that although the terms of the above section are very broad, they were not meant to apply to a failure to pay income tax, since, by the following section (ninth) of the same act (March 2d, 1867), specific provision was made for the alteration of the ten per cent. penalty which had been previously imposed for the non-payment of income tax. Section 119 of the act of 1864, as amended by ninth section of act of March 2d, 1867, 14 Stat., page 480.)

The twenty-eighth section of the act of 1864 (13 Stat., 232) provided for the imposition of a ten per cent. penalty in certain cases of failure to pay internal revenue taxes. It enacted that "with respect to all such duties as are not included in the annual lists as aforesaid, all taxes and duties, the collection of which is not otherwise provided for in this act, it shall be the duty of each collector in person or by deputy to demand payment thereof in the manner last mentioned, within ten days from and after receiving the list thereof from the assessor, or within twenty days from and after the time within which such duty or tax shall have been paid, and if the annual or other duties shall not be paid within ten days from and after such demand therefor, it shall be lawful for such collector or his deputies to proceed to collect the said duties or taxes with ten per centum additional thereto, as aforesaid, by distraint, &c."

For several reasons this section is inapplicable to the income tax, general or special.

The collection of the general income tax and of the special income tax on corporate dividends and interest were "*otherwise provided for*" in the act.

See income-tax sections generally, and especially the one hundred and twenty-second section (13 Stat., 284).

Besides, the clause quoted from the twenty-eighth section of the act of 1864 refers to a penalty of ten per cent., which has been previously imposed; the collector being required to collect the tax, "with ten per centum additional thereto *as aforesaid;*" and on looking back to the previous portion of the twenty-eighth section we find that the penalty of ten per centum was imposed for the non-payment of the taxes on the *annual* list only, which annual list was not intended to include taxes on dividends and interest, these, by the one hundred and twenty-second section of the act, being payable to the Commissioner of Internal Revenue within thirty days from the time when the dividends or interest fell due.

The provisions of the nineteenth section of the act of July 1st, 1862 (12 Stat. at Large, 439), were precisely similar in this respect to those of the twenty-eighth section of the act of 1864; and in the official "Instructions to Assessors and Collectors," printed at page 150 of Mr. Este's "Excise Tax Law," 1863, it is said that "the ten per centum penalty prescribed in section 19 attaches only to the lists of which notice is given by advertisement and four posted notifications. None but annual lists are required to be advertised in that manner, and no extra per centum is to be added to monthly, quarterly or other lists, except as specially provided in sections 46, 55, 80, 88 and 92 of the act of July 1st, 1862."

The ninth section of the act of July 13th, 1866 (14 Stat., pages 106 and 107), may be referred to as authorizing the imposition of the ten per cent. penalty.

But the ninth section of the act of 1866 was in this respect merely a substantial re-enactment of the twenty-eighth section of the act of 1864; and if Congress had intended to alter the official construction put upon the former act, or rather upon the original act of 1862, of which the act of 1864 was but a repetition, such an intention would have been clearly expressed.

But so far from this being the case, the general similarity of the language of the amended and re-enacted twenty-eighth section of the act of 1864 to that section as originally enacted furnishes the strongest evidence that no alteration in this respect was intended.

The twenty-eighth section, as originally enacted, required the collector to give notice by advertisement and posting of the day when the taxes on the annual list would be payable, and then provided that "all persons who shall neglect to pay the duties and taxes so as aforesaid assessed shall be liable to pay ten per centum additional upon the amount thereof, the fact of which liability shall be stated in the advertisement and notifications aforesaid."

The amended section omits this clause between quotation marks, it being the clause by which in the original section the penalty was imposed, and supplies its place by providing that after default made after service of the personal notice (required in the amended as well as in the original section), "it shall be the duty of the collector or his deputy to collect the said taxes and fee of twenty cents and mileage, with a penalty of ten per centum additional upon the amount of taxes."

In each case the ten per centum penalty is expressly and specifically imposed for the non-payment of annual duties only, although there is a slight difference in the phraseology of the two sections.

Then the original section goes on to provide as follows:—"And with respect to all such duties or taxes as are not included in the annual lists as aforesaid, and all taxes or duties the collection of which is not otherwise provided for in this act, it shall be the duty of each collector, in person or by deputy, to demand payment thereof, in the manner last mentioned, within ten days after receiving the list thereof from the assessor, or within twenty days from and after the expiration of the time within which such duty or tax should have been paid; and if the annual or other duties shall not be paid within ten days from and after such demand therefor, it shall be lawful for such collector or his deputies to proceed to collect the said duties or taxes, with ten per centum additional thereto, as aforesaid, by distraint and sale of the goods, chattels or effects of the persons delinquent as aforesaid."

In place of this the amended section provides as follows:—"And with respect to all such taxes as are not included in the annual lists as aforesaid, all taxes, the collection of which is not otherwise provided for in this act, it shall be the duty of each collector, in person or by deputy, to give notice and demand payment thereof, in the manner last mentioned, within ten days from and after receiving the list thereof from the assessor, or within twenty days from and after the expiration of the time within which such tax should have been paid; and, if the annual or other taxes shall not be paid within ten days from and after such notice and demand, it shall be lawful for such collector or his deputies to proceed to collect the said taxes, with ten per centum additional thereto, as aforesaid, by distraint and sale of the goods, chattels or effects, including stocks, securities and evidences of debt of the persons delinquent as aforesaid." It seems impossible to contend that there is any change of language here which would affect the construction of the phrase "with ten per centum additional thereto AS AFORESAID," which is used in each case, or prevent its being referred to the "annual" duties or taxes which were to be collected, and to which only it had been applied in the previous portion of the act—that is, "as aforesaid."

Besides, this amended section was not intended to have any wider scope than the section for which it was substituted.

Subsequent provisions of the amendatory act strengthen this position. If the penalty of ten per cent. was imposed by the amended section, why was the eleventh section, which followed the amendatory section (ninth) above referred to, passed? This eleventh section was evidently intended to apply to taxes not on the annual list, and the ten per cent. penalty which it imposed would have been entirely unnecessary if it had already been imposed by the amendment made by the preceding ninth section.

This eleventh section of the act of July 13th, 1866, reads as follows:—

"That all lists or returns required to be made monthly by any person, firm, company, corporation or party whatever liable to tax shall be made on or before the tenth day of each and every month, and the tax assessed or due thereon shall be certified or returned by the assessor to the collector on or before the last day of each and every month. And all lists or returns required to be made quarterly, and all other lists or returns for which no provision is otherwise made, shall be made on or before the tenth day of each and every month in which said list or return is required to be made, or succeeding the time when the said tax may be due and liable to be assessed, and the tax thereon shall be certified or returned as herein provided for monthly lists or returns; and the tax shall be due and payable on or before the last day of each month. And in case said tax is not paid on or before the last day of each and every month, the collectors shall add ten per centum thereto: *Provided,* That notice of the time when such tax shall become due and payable shall be given in such manner as shall be prescribed by the Commissioner of Internal Revenue; and if said tax shall not be paid on or before the last day of the month, as aforesaid, it shall be the duty of said collector to demand payment thereof, with ten per centum additional thereto, in the manner prescribed by law; and if said tax and ten per centum additional are not paid within ten days from and after such demand thereof, it shall be lawful for the collector or his deputy to make distraint therefor as provided by law; and so much of section eighty-three of act of June thirtieth, eighteen hundred and sixty-four (1864), as amended by the act of March third, eighteen hundred and sixty-five, as relates to the time and payment and collection of tax, is hereby repealed; and in all cases of neglect to make such list or returns, or in cases of false and fraudulent returns, the provisions of existing law as amended by this act shall be applicable thereto." (14 Stat. at Large, page 150.)

Whatever may be the scope or effect of this section, whether it was intended merely to replace the provisions of the existing law, which it repealed, or to have a wider operation, it can not apply to the tax on dividends, interest and surplus profits of railroad companies.

The lists or returns of these subjects of taxation were neither monthly nor quarterly returns, nor could they be included within the specification of "*all other lists or returns for which no provision is otherwise made,*" which were to be "made on or before the tenth day of each and every month in which said list or return is required to be made, or succeeding the time when the tax may be due and liable to be assessed," since as to these lists "provision was otherwise made," and by a preceding section (the ninth) of the very act of ~~March~~ July 13th, 1866, from which the eleventh section has been quoted. This ninth section amended the one hundred and twenty-second section of the act of 1864 (the section relating to the tax on dividends, &c.) by reenacting it, with the substitution of this clause:—"And a list or return shall be made and rendered to the assessor and assistant assessor on or before the tenth day of the month following that in which said interest, coupons or dividends become due and payable, and as often as every six months," for the following in the original section:—"And a list or return shall be made and rendered to the assessor or assistant assessor in duplicate, and one of said lists or returns shall be transmitted and the duty paid to the Commissioner of Internal Revenue within thirty days after the time when the said interest, dividends or coupons become due and payable, and as often as every six months."

Another important consideration must not be overlooked.

This eleventh section of the act of July 13th, 1866, is no part of the income-tax law. So much might be inferred from what has already been said. But its very language shows its inapplicability to the collection of income tax through the agency of corporations, as provided for in the one hundred and twenty-second section of the act of 1864. It refers to lists or returns to be made by persons or corporations "liable to tax." The penalty which it imposes was intended for delinquent tax-payers not delinquent tax-collectors.

There was a specific penalty of $1000 for the failure of corporations to discharge the function of tax-collectors. This specific penalty was in fact re-imposed by a preceding section (the ninth) of the very amendatory act of July 13th, 1866 (14 Stat., page 139). By what rule of construction applicable to penal statutes can it be supposed that to a specific penalty imposed for a specific offense in one section of a statute, is to be superadded a penalty imposed in general terms, in a subsequent part of the statute, upon a class of offenses similar in character to the particular offense in question?

Excepting the case of Erskine *vs.* The St. Paul and Milwaukee Railroad Company, 4 Otto, 619, there does not appear to be any reported decision of this court on the question under discussion; but it is a circumstance of no little significance that in the celebrated case of Bailey *vs.*

The Railroad Company, 22 Wallace, 654 (involving the enormous sum claimed as a tax on the scrip dividends of the New York Central Railroad Company, and which was contested so bitterly out of the courts as well as in), the penalty assessed for the non-payment of an alleged tax of over $1,000,000 was but the sum of $1000 imposed by the one hundred and twenty-second section of the act of 1864, and that on appeal to the commissioners even this penalty was remitted. So, too, in the case of The Savings Bank *vs.* The United States, 19 Wallace, 227, nothing is said about the penalty of five per cent. and interest at the rate of one per cent. a month; and under the peculiar circumstances of the case, showing no culpable default in the payment of the tax, the court below appears to have disallowed any interest at all upon the principal sums in default.

The second question is—

The second question is whether the omission to pay the taxes on dividends and interest imposed by the fifteenth section of the act of July 14th, 1870, entitled "An act to reduce internal taxes and for other purposes" (see 16 Stat. at Large, page 257), subjected a railroad company so omitting to a penalty of five per cent. on the principal of the said tax, and interest at the rate of one per cent. a month on the said principal.

The act of July 14th, 1870 (16 Stat. at Large, page 256), imposed for the first time a tax on income accrued during the years 1870 and 1871, including therein dividends and interest paid by corporations.

The sections which relate specially to the imposition of the tax upon the dividends and interest paid by railroad companies and certain other corporations and the mode in which the tax is to be returned and collected, must first be considered.

The fifteenth section imposed the tax, viz., two and a half per cent., on the dividends and interest in question. Under the decision of the Supreme Court of the United States in the case of Blake *vs.* The National Banks, 23 Wallace, 307, this tax became chargeable on and after the first day of August, 1870. There is nothing in this section which requires any special comment in this connection.

The sixteenth section provided for the return of the dividends or interest payable under the preceding section, and following the language of the superseded one hundred and twenty-second section of the act of June 30th, 1864, as amended by the act of July 13th, 1866 (14 Stat. at Large, 138), this return was required to be rendered to the assessor or the assistant assessor on or before the tenth day of the month following that in which the dividends, &c. became due and payable.

The same section concludes thus:—"And for any default in the making or rendering of such return with such declaration annexed, the corporation so in default shall forfeit as a penalty the sum of $1000; and in case of any default in making or rendering such return, or of any default in the payment of the tax as required or any part thereof, the assessment and collection of the tax and penalty shall be in accordance with the general provisions of law in other cases of neglect and refusal."

On comparing this clause with the corresponding clause of the amended one hundred and twenty-second section of the act of June 30th, 1864, we find the penalty of $1000 in the act of 1870 is made applicable to the omission to make and render the return only, and does not extend, as in the act of 1864, to the omission to pay the tax also.

This alteration appears to have no special significance beyond the mere fact of its being an alteration. In construing a penal statute, we are not to assume, because a well-defined existing penalty has been omitted, that the legislature intended to impose another.

The fifteenth section of the act of 1870 expressly provides for the collection of a penalty; and when we inquire what penalty is to be collected, how can we doubt that the penalty to be collected is that which has just been imposed.

It is respectfully submitted that unless all rules of statutory construction are to be violated for the purpose of making a penal statute as oppressive as possible, the penalty to be enforced under the fifteenth section must be deemed to be the penalty imposed by the same section. It can not be possible that the natural and obvious relation between the word "penalty" in the beginning and the same word in the conclusion of the sentence can be disregarded.

It is not proposed, however, to repeat an argument which has already been made when considering the meaning of the penal clause in the one hundred and twenty-second section of the act of 1864. What was said there is just as applicable here.

But, if it shall be contended that we must look elsewhere than in the fifteenth section for the "penalty" which is to be assessed and collected, under the fifteenth section, where shall it be found?

If we look to the tenth section, we find that for the omission to pay the general income tax, when it became payable, there was to be levied and collected, "as a penalty, the sum of five per centum on the amount unpaid, and interest on said amount at the rate of one per centum per month, from the time the same became due, except from the estates of deceased, insane or insolvent persons."

This general income tax was leviable on the first day of March, and payable on or before the thirtieth day of April, in the year succeeding that on the income of which the tax was chargeable, and it is expressly said that the penalty above mentioned shall be chargeable, "in addition to any sum *annually due and unpaid after the thirtieth day of April*, and for ten days after notice and demand thereof by the collector." The mere statement of these provisions seems to be all that can be required to show that the penalty mentioned in the tenth section can not be the one intended to be referred to in the fifteenth section.

In the eleventh section we find that penalties are imposed for neglect or refusal to make a return of general income, and for making a false return,—fifty per centum in the first case and one hundred per centum in the latter, of an amount of income to be estimated by the assistant assessor, according to the best information obtainable by him by an examination of the delinquent, "or of his books or accounts or by any other evidence." Neither penalty, however, was to be assessed "except after reasonable notice of the time and place of hearing, to be regulated by the Commissioner of Internal Revenue, so as to give the person charged an opportuuity to be heard." Certainly neither of these penalties can be made applicable to the omission to make any other return than that to which they so specifically refer; and *a fortiori*, they are inapplicable to the case of neglect to pay a tax which had been returned under the fifteenth section.

And here it may be remarked, that after providing for the imposition of a penalty for omitting to make a general income return or for making a false return, the eleventh section goes on to say that "the tax and the addition thereto, as a penalty, shall be assessed and collected in the manner provided for in cases of willful neglect or refusal to render a return or of rendering a false or fraudulent return."

The language here quoted is substantially the same as that contained in the fifteenth section. The latter also says that "the assessment and collection of the tax and penalty shall be in accordance with the general provisions of law in other cases of neglect and refusal." Can it be doubted that the penalty collectible under the eleventh section was that imposed by the same section, and why should a different rule of construction be applied to the fifteenth section?

There is no other penalty imposed by the act of July 14th, 1870, which can by any possibility be referred to as the penalty collectible under the sixteenth section.

The penalties prescribed by the income-tax law, which was superseded and supplied by the act of July 14th, 1870, can not be imported into the latter law. Implication and inference are never sufficient warrants for the imposition of penalties, and very express language should be required to induce a court to decide that penalties which are chargeable for breaches of a superseded law were meant to be renewed for breaches of the law which supplied the place of the former.

There is, moreover, a special significance in the fact that the penalty of five per cent. of the principal of unpaid taxes and interest on the said principal, at the rate of one per cent. a month, was expressly imposed by the tenth section of the act of July 14th, 1870, for default in paying the general income tax created by that act. If Congress had intended that the penalties in force under the act of June 30th, 1864, and its amendments, should be extended *proprio vigore* to the act of July 14th, 1870, there would have been no occasion for this special re-enactment. *Expressio unius est exclusio alterius.* But even if the penalty provisions of the amended act of June 30th, 1864, are to be resorted to in the present case, they contain no warrant for the imposition of the penalty contended for.

This the defendants in error have already attempted to show.

JAMES E. GOWEN,
For Defendants in Error.

No. 125. October Term, 1878.

Supreme Court of the United States.

ELLIOTT,

Plaintiff in Error and Defendant below,

vs.

THE EAST PENNSYLVANIA RAILROAD COMPANY,

Defendants in Error and Plaintiff below.

Error to the Circuit Court of the United States for
the Eastern District of Pennsylvania.

SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR.

JAMES E. GOWEN,
For Defendants in Error.

Allen, Lane & Scott, Printers, 233 South Fifth Street, Philadelphia.

Supreme Court of the United States.

Elliott, Collector, vs. *The East Pennsylvania Railroad Company.*	October Term, 1878. No. 725.

BRIEF OF DEFENDANT IN ERROR IN REPLY TO THE BRIEF OF THE PLAINTIFF IN ERROR.

The brief heretofore filed by the defendant in error was unavoidably prepared before copies of the plaintiff's brief were filed.

The following memoranda as to points in the latter brief which were not anticipated in the former are submittted.

The section 80 of the act of July 1st, 1862 (12 Stat., 468) is referred to by the plaintiff, apparently because it imposed double penalties, *i. e.*, five per cent. for the non-payment of the tax therein mentioned and the sum of $1000, for a wilful attempt to evade the payment of the tax.

The tax in question was on gross receipts from railroads and steamboats, and was chargeable directly against the persons or corporations owning the railroads or steamboats.

It formed no part of the income tax, and consequently was not collected by railroad or steamboat corporations as agents of the Government for the collection of a tax due by their stockholders.

In accordance with a theory which seems to have been adopted by Congress, the failure of the tax-payer to pay the tax when due resulted in a percentage addition being made to the tax; and for a wilful attempt to evade payment an additional penalty was imposed.

How a reference to this eightieth section of the act of 1862 tends to confirm the construction put upon the one hundred and twenty-second section of the act of 1864 is not easily perceived. The result would seem to be the other way.

The intention to impose two penalties was very clearly expressed in the former section; and in this respect the contrast between the two sections is quite apparent.

The same contrast appears on a comparison between the eightieth section of the act of 1862 and the following (eighty-first) section of the same act, which provided for the agency of corporations in collecting the tax on dividends and interest. Here no addition was to be made to the tax when payment was delayed, but a penalty of $500 was to be imposed for neglect to make returns. *Id.*, 470.

It thus appears that from the very beginning a distinction as to penalties was made between tax-payers and tax-collectors.

Any inquiry into the reasonableness of this distinction would be superfluous—although it would not be difficult to suggest a good reason.

Besides, it was assumed that *untaxed* dividends and interest would be returned by the recipients as part of their income.

The plaintiff in error seems to suppose that this provision was introduced for the first time by the act of June 30th, 1864. This is a mistake, however, as will be seen by comparing the ninety-first section of the act of July 1st, 1862 (12 Stat., 474) and the one hundred and seventeenth section of the act of June 30th, 1864 (13 Stat., 281).

It is also a mistake, although an immaterial one, to say that the $500 penalty mentioned in the eighty-first section of the act of 1862 (12 Stat., 470) was meant to be imposed upon the managers of corporations instead of the corporations themselves.

The section of the act of June 30th, 1864, which relates to the tax on gross receipts, is the one hundred and ninth (13 Stat., 277); that which relates to the tax on interest and dividends paid by railroad companies is the one hundred and twenty-second. *Id.*, 284.

The same distinction as to penalties which existed in the corresponding sections of the act of 1862 is retained.

We can not presume that this was accidental; and if it were, the courts can not supply legislative omissions or correct legislative mistakes.

The theory of the plaintiff in error (see his brief, page 10) as to the $1000 penalty in the one hundred and ninth section being intended for the managers of the corporation and not for the corporation itself, is as unfounded in its application to the act of 1864 as to the act of 1862.

The same theory appears to be suggested rather than expressed with reference to the one hundred and twenty-second section of the act of 1864; but with even less plausibility.

No doubt it was suggested by the obvious necessity of showing that the penalty collectible from the corporation itself, under the one hundred and twenty-second section of the act of 1864, was not the $1000 penalty, but some other penalty.

The reference to the clause of the one hundred and twenty-second section, which provides that "the assessment and collection of the tax and penalty shall be made according to the provisions of the law in other cases of neglect or refusal," has the same object.

But this provision affords no warrant for the inference which the court is asked to sustain.

It can not be contended that the *tax collectible* under the one hundred and twenty-second section was a *different tax* from that imposed by the section itself; and by what rule of construction can the same words mean one thing when applied to the *tax* and another thing when applied to the *penalty?*

The language quoted is but a substantial repetition of that used in the eighty-first section of the act of 1862—the word penalty being inserted, because the penalty for the non-payment of the tax was then first imposed.

It is true that the forty-first section of the act of June 30th, 1864, did provide that all fines and penalties and forfeitures should be sued for and recovered, &c., but obviously this section was not meant to be applicable when it was otherwise provided.

The plaintiff in error suggests that the true intent of the clause of the one hundred and twenty-second section of the act of June 30th, 1864, which provides that "the assessment and collection of the tax and penalty shall be made according to the provisions of law in other cases of neglect or refusal," is to be found in the paraphrase of the terms used, which is contained in the following extract from his brief:—

"The penalty last referred to is obviously that which may be assessed (in default of return) and collected (in default of payment) with the tax." Page 13.

This would seem to imply that the penalty in default of return must be assessed, and the penalty in default of payment was to be collected; and, inferentially, that the former penalty was not to be collected, and the latter not to be assessed. This can not possibly have been the intent of Congress.

But apart from this criticism, what were the penalties for default in return and default in payment, which were to be imposed, in addition to the $1000 penalty, specifically mentioned in this section?

We know what the penalty for default in payment is said to be; but what was the penalty for default in making a return?

If the brief of the plaintiff in error is rightly understood, it is said to be the penalty of an addition of fifty per cent. to the tax, which is prescribed by the fourteenth section of the act of June 30th, 1864 (13 Stat., 226), which was amended and re-enacted by the ninth section of the act of July 13th, 1866, 14 Stat., page 101.

This section is very general in its terms, and it must be admitted that there is quite as much reason for contending that it applies to the case of default in making a return under the one hundred and twenty-second section of the act of 1864, as that the twenty-eighth section of the act of 1864 applies to the case of non-payment of tax under the same one hundred and twenty-second section; and the exigencies of the plaintiff in error's case require him to contend that both sections—the fourteenth and twenty-eighth—are referred to and made parts of the one hundred and twenty-second section.

But the fourteenth section of the act of 1864 can not possibly be construed as applying to default in making the returns required by the one hundred and twenty-second section of the act of 1864, for several reasons.

As the act of 1864 originally stood, the returns required by the one hundred and twenty-second section were to be made direct to the Commissioner of Internal Revenue, while the fourteenth section obviously applied to the failure to make returns to an assessor or assistant assessor.

The amendatory act of July 13th, 1866, charged this, by requiring returns under the one hundred and twenty-second section to be made to the assessor or assistant assessor; but, even after this change, the fourteenth section, as itself amended, remained inapplicable to returns required by the one hundred and twenty-second section.

All its (the fourteenth section's) provisions apply to the case of an omission by individual tax-payers, to make the returns required by law.

Provision is made for the case of "any *person*" "*being absent from his or her residence or place of business*" when the assessor shall call for the annual list or return. There is indeed no reference to absence from residence or usual place of business when "a monthly or other list or return" is not delivered "at the time required by law," but all the details of the proceedings to be taken by the assessor to obtain a list or return in either case, show that Congress had in view the case of a default by an individual tax-payer.

It is made lawful for the assessor to summon "such person, his agent or other person, having possession, custody or care of books of account containing entries relating to the trade or business of such person; * * * * to give testimony, or answer interrogatories, under oath or affirmation."

But, without referring to all the *minutia* of the section, it is believed that even a cursory examination of it will show its inapplicability to the case of a corporation failing to make a return under the one hundred and twenty-second section.

The theory that the general provisions of the fourteenth section of the act of 1864, as amended by the act of July 13th, 1866, were intended to apply to all cases of default in making returns under the internal revenue act, would lead to singular results.

As an illustration, the court is asked to refer to the one hundred and eighteenth section of the act of 1864 (13 Stat., 282) as amended by the act of March 3d, 1865 (13 Stat., 480).

As this one hundred and eighteenth section was originally passed, it provided that in case of neglect or refusal to make an income return, " the assessor or assistant assessor shall assess the amount of his or her income, and the duty thereon, in the same manner as is provided for in other cases of neglect or refusal to furnish lists or returns in the provisions of this act, when not otherwise incompatible; and the assistant assessor may increase the amount of the list or return, or of any person making such return, if he shall be satisfied that the same is understated."

It could not well be contended that the penalty of fifty per cent. prescribed by the fourteenth section could be imported into this one hundred and eighteenth section; but let us see what alteration had been made in the one hundred and eighteenth section, when by the act of July 13th, 1866, the fourteenth section of the act of 1864 was amended and re-enacted. By the act of March 3d, 1865, the one hundred and eighteenth section had been amended and re-enacted, and a specific penalty of twenty-five per centum imposed "in all cases of *willful* neglect or refusal to make and render a list or returns." Now, can it be believed that this twenty-five per centum penalty was to be superadded to the fifty per cent. penalty under the fourteenth section; and that Congress meant that a default in rendering an income return was to be visited, not with a penalty of twenty-five per cent., as the one hundred and eighteenth section prescribed, but with a penalty of seventy-five per cent.?

A conclusion so palpably unreasonable in itself, and so inconsistent with the plain intent of the one hundred and eighteenth section, must be unwarrantable; and yet, if the plaintiff is right in contending that the penalty, or rather penalties, in the one hundred and twenty-second section, were merely cumulative, it must follow that this conclusion is right also.

The plaintiff's contention that the fourteenth section of the act of 1864 prescribed one of the two supposed penalties incurred for default in making the return required by the one hundred and twenty-second section, is a parallelism with the contention that the twenty-eighth section of the same act prescribes one of the two supposed penalties for default in making the return required by the one hundred and twenty-second section. The latter proposition was anticipated and discussed in the brief heretofore filed on behalf of the defendant in error.

But the plaintiff's theory of cumulative penalties is supposed to be strengthened by a reference to following clause of the forty-ninth section of the act of 1864 (13 Stat., 241), which proceeded that "any additions to duties, fines, penalties or forfeitures *hereinafter* imposed for failure to perform any duty required to be performed shall be held and taken to be additional to those *herinbefore* provided."

In the case of a statutory provision so purely penal in its character, it would be sufficient to say that the supplementary penalty must be imposed as an *addition* to a previously prescribed penalty. Such are the words of the act.

But treating the section with a liberality of construction never accorded to penal statutes, where, in any section of the act of 1864 preceding the forty-ninth, or in fact in any section except the one hundred and twenty-second, is there any penalty to be found for the failure to perform the duty which was for the first time imposed by the one hundred and twenty-second section?

The word "hereinbefore," used in the forty-ninth section, refers, of course, to the preceding sections of the act of 1864 itself—and looking to that act alone we find that the penalties imposed by the preceding sections for default in making returns and paying taxes related to returns and payments to be made to assessors and collectors—and not to returns and payments to be made to the Commissioner of Internal Revenue.

Subsequent amendments of the act of 1864 could not have had the effect of altering the meaning of the forty-ninth section, which was left unchanged; and even if this was not so, it is respectfully submitted that the brief already filed shows that no section substituted for a section in the act of 1864, except alone the one hundred and twenty-second section, imposes a penalty for default in returning and paying the tax referred to in that section.

It would, besides, seem to be unquestionable that when by sections of the act of 1864, either as it was originally passed, or as it was subsequently amended, special provision was made for a particular department of the internal revenue system, there could be no presumption that either the penalties or duties relating to this particular department were to be aggregated or confused with preceding penalties or duties.

According to the argument of the plaintiff in error, the penalties imposed for default in rendering returns or in making payments by the sections of the act of 1864, preceding the sections which relate to income, must have been intended to be added to those imposed by the income sections. The extraordinary result which this would lead to has already been indicated; and other similar illustrations might be found, if it were necessary.

Since the brief of the plaintiff in error was furnished, a decision of this court on the subject of cumulative penalties has appeared in print—U. S. *vs.* Claflin, Nov., 1878, to which, and the cases there cited, as well as the opinion of Field, J., in Stockwell *vs.* The U. S., 13 Wallace, 553, reference is hereby made.

As to all other points in the case, including the question of penalty, under the act of July 14th, 1870, the defendants in error are content to abide by the brief which they have already filed.

JAMES E. GOWEN,
For Defendants in Error.

Jany. 22, 79. N. H. Sawyer

Income Tax Sections

OF THE

ACT OF CONGRESS OF JUNE 30th, 1864,

As originally Passed and as subsequently Amended.

THE LEISENRING PRINT.

INCOME TAX SECTIONS OF THE ACT OF JUNE 30th, 1864, AS ORIGINALLY PASSED, AND AS SUBSEQUENTLY AMENDED.

Section 116 as originally passed (13 Stat. at Large, 281).

And be it further enacted, That there shall be levied, collected, and paid annually upon the annual gains, profits, or income of every person residing in the United States, or of any citizen of the United States residing abroad, whether derived from any kind of property, rents, interests, dividends, salaries, or from any profession, trade, employment, or vocation, carried on in the United States or elsewhere, or from any other source whatever, except as hereinafter mentioned, if such annual gains, profits, or income exceed the sum of six hundred dollars, a duty of five per centum on the excess over six hundred dollars and not exceeding five thousand dollars; and a duty of seven and one-half of one per centum per annum on the excess over five thousand dollars, and not exceeding ten thousand dollars; and a duty of ten per centum on the excess over ten thousand dollars. And the duty herein provided for shall be assessed, collected, and paid upon the gains, profits, or income for the year ending the thirty-first day of December next, preceding the time for levying, collecting, and paying said duty: *Provided*, That income derived from interest upon notes, bonds, and other securities of the United States shall be included in estimating incomes under this section: *Provided*, That only one deduction of six hundred dollars shall be made from the aggregate incomes of all the members of any family composed of parents and minor children, or husband and wife, except in cases where such separate income shall be derived from the separate and individual estate, gains, or labor of the wife or child: *And provided further,* That net profits realized by sales of real estate purchased within the year for which income is estimated, shall be chargeable as income; and losses on sales of real estate purchased within the year for which income is estimated shall be deducted from the income of such year.

Section 116 as amended by act of March 3d, 1865 (13 Stat. at Large, 479); by act of July 13th, 1866, §9 (14 ibid., 137); and by act of March 2d, 1867, §13 (14 ibid., 477).

That there shall be levied, collected, and paid annually, upon the gains, profits, and income of every person residing in the United States, or of any citizen of the United States residing abroad, whether derived from any kind of property, rents, interests, dividends, or salaries, or from any profession, trade, employment, or vocation, carried on in the United States or elsewhere, or from any other source whatever, a tax of five per centum on the amount so derived over one thousand dollars, and a like tax shall be levied, collected, and paid annually upon the gains, profits, and income of every business, trade, or profession carried on in the United States by persons residing without the United States, and not citizens thereof. And the tax herein provided for shall be assessed, collected, and paid upon the gains, profits, and income for the year ending the thirty-first day of December next preceding the time for levying, collecting, and paying said tax.

Section 117 as originally passed (13 Stat. at Large, 281).

And be it further enacted, That in estimating the annual gains, profits, or income of any person, all national, State, and municipal taxes, other than the national income tax, lawfully assessed within the year upon the property or sources of income of any person, as aforesaid, from which said annual gains, profits, or income is or should be derived, shall be deducted, in addition to six hundred dollars, from the gains, profits, or income of the person who has actually paid the same, whether owner, tenant or mortgagor; also the salary or pay received for services in the civil, military, naval, or other service of the United States, including senators, representatives, and delegates in Congress, above the rate of six hundred dollars per annum; and there shall also be deducted the income derived from dividends on shares in the capital stock of any bank, trust company, savings institution, insurance, railroad, canal, turnpike, canal navigation, or slackwater company, and the interest on any bonds or other evidences of indebtedness of any such corporation or company, which shall have been assessed and the tax paid, as hereinafter provided; also the amount paid by any person for the rent of the homestead used or occupied by himself or his family, and the rental value of any homestead used or occupied by any person or by his family, in his own right or in the right of his wife, shall not be included and assessed as part of the income of such person. In estimating the annual gains, profits, or income of any person, the interest over and above the amount of interest paid upon all notes, bonds, and mortgages, or other forms of indebtedness, bearing interest, whether due and paid or not, if good and collectable, shall be included and assessed as part of the income of such person for each year; and also all income or gains derived from the purchase and sale of stocks or other property, real or personal, and the increased value of live stock, whether sold or on hand, and the amount of sugar, wool, butter, cheese, pork, beef, mutton, or other meats, hay and grain, or other vegetable or other productions of the estate of such person sold, not including any part thereof unsold or on hand during the year next preceding the thirty-first of December, shall be included and assessed as part of the income of such person for each year, and the gains and profits of all companies, whether incorporated or partnership, other than the companies specified in this section, shall be included in estimating the annual gains, profits, or income of any person entitled to the same, whether divided or otherwise. In estimating deductions from income, as aforesaid, when any person rents buildings, lands, or other property, or hires labor to carry on land, or to conduct any other business from which such income is actually derived, or pays interest upon any actual incumbrance thereon, the amount actually paid for such rent, labor, or interest shall be deducted; and also the amount paid out for usual or ordinary repairs, not exceeding the average paid out for such purposes for the preceding five years, shall be deducted, but no deduction shall be made for any amount paid out for new buildings, permanent improvements, or betterments, made to increase the value of any property or estate: *Provided*, That in cases where the salary or other compensation paid to any person in the employment or service of the United States shall not exceed the rate of six hundred dollars per annum, or shall be by fees, or uncertain or irregular in the amount or in the time during which the same shall have accrued or been earned, such salary or other compensation shall be included in estimating the annual gains, profits, or income of the person to whom the same shall have been paid, in such manner as the Commissioner of Internal Revenue, under the direction of the Secretary of the Treasury, may prescribe.

Section 117 as amended by act of March 3d, 1865, §1, (13 Stat. at Large, 479,) and by act of March 2d, 1867, §13 (14 ibid., 478).

That, in estimating the gains, profits, and income of any person, there shall be included all income derived from interest upon notes, bonds, and other securities of the United States; profits realized within the year from sales of real estate purchased within the year, or within two years previous to the year for which income is estimated; interest received or accrued upon all notes, bonds, and mortgages, or other forms of indebtedness bearing interest, whether paid or not, if good and collectable, less the interest which has become due from said person durinthe year; the amount of all premium on gold and coupons; the amount of sales of live stock, sugar, wool, butter, cheese, pork, beef, mutton, or other meats, hay and grain, or other vegetable or other productions, being the growth or produce of the estate of such person, not including any part thereof consumed directly by the family; all other gains, profits, and income derived from any source whatever, except the rental value of any homestead, used or occupied by any person, or by his family in his own right, or in the right of his wife; and the share of any person of the gains and profits of all companies, whether incorporated or partnership, who would be entitled to the same, if divided, whether divided or otherwise, except the amount of income received from institutions or corporations, whose officers, as required by law, withhold a per centum of the dividends made by such institutions, and pay the same to the officer authorized to receive the same; and except that portion of the salary or pay received for services in the civil, military, naval, or other service of the United States, including senators, representatives, and delegates in Congress, from which the tax has been deducted. And in addition to one thousand dollars exempt from income tax, as hereinbefore provided, all national, State, county, and municipal taxes paid within the year shall be deducted from the gains, profits, or income of the person who has actually paid the same, whether such person be owner, tenant, or mortgagor; losses actually sustained during the year arising from fires, shipwreck, or incurred in trade, and debts ascertained to be worthless, but excluding all estimated depreciation of values and losses within the year on sales of real estate purchased two years previous to the year for which income is estimated; the amount actually paid for labor or interest by any person who rents lands or hires labor to cultivate land, or who conducts any other business from which income is actually derived; the amount actually paid by any person for the rent of the house or premises occupied as a residence for himself or his family; the amount paid out for usual or ordinary repairs: *Provided*, That no deduction shall be made for any amount paid out for new buildings, permanent improvements, or betterments, made to increase the value of any property or estate: *And provided further*, That only one deduction of one thousand dollars shall be made from the aggregate income of all the members of any family, composed of one or both parents and one or more minor children, or husband and wife; that guardians shall be allowed to make such deduction in favor of each and every ward, except that in case where two or more wards are comprised in one family, and have joint property interest, only one deduction shall be made in their favor: *And provided further*, That in cases where the salary or other compensation paid to any person in the employment or service of the United States shall not exceed the rate of one thousand dollars per annum, or shall be by fees, or uncertain or irregular in the amount or in the time during which the same shall have accrued or been earned, such salary or other compensation shall be included in estimating the annual gains, profits, or income of the person to whom the same shall have been paid.

Section 118 as originally passed (13 Stat. at Large, 282).

And be it further enacted, That it shall be the duty of all persons of lawful age, and all guardians and trustees, whether such trustees are so by virtue of their office as executors, administrators, or in other fiduciary capacity, to make a list or return under oath or affirmation, in such form and manner as may be prescribed by the Commissioner of Internal Revenue, to the assistant assessor of the district in which he resides, of the amount of his or her income, or the income of such minors or persons as may be held in trust as aforesaid, according to the requirements hereinbefore mentioned, stating the sources from which said income is derived, whether from any kind of property, or the purchase and sale of property, rents, interest, dividends, salaries, or from any profession, trade, employment, or vocation, or otherwise. And in case of neglect or refusal to make such return, the assessor or assistant assessor shall assess the amount of his or her income, and the duty thereon, in the same manner as is provided for in other cases of neglect and refusal to furnish lists or returns in the provisions of this act, where not otherwise incompatible; and the assistant assessor may increase the amount of the list or return, or of any party making such return, if he shall be satisfied that the same is understated: *Provided*, That any party in his or her own behalf, or as guardian or trustee, as aforesaid, shall be permitted to declare, under oath or affirmation, the form and manner of which shall be prescribed by the Commissioner of Internal Revenue, that he or she was not possessed of an income of six hundred dollars, liable to be assessed according to the provisions of this act, or may declare that he or she has been assessed elsewhere in the same year for and has paid an income duty, under authority of the United States, and shall thereupon be exempt from income duty in said district; or, if the list or return of any party shall have been increased by the assistant assessor, in manner as aforesaid, such party may be permitted to declare, under oath or affirmation, the amount of annual income, or the amount held in trust, as aforesaid, liable to be assessed, and the same, so declared, shall be received by such assistant assessor as true, and as the sum upon which duties are to be assessed and collected, except that the deductions claimed in such cases shall not be made or allowed until approved by the assistant assessor. But any person feeling aggrieved by the decision of the assistant assessor in such cases, may appeal to the assessor of the district, and his decision thereon shall be final; and the form, time, and manner of proceedings shall be subject to rules and regulations to be prescribed by the Commissioner of Internal Revenue.

Section 118, as amended by act of March 3d, 1865, §1, (13 Stat. at Large, 480,) and by act of March 2d, 1867, §13 (14 ibid., 479).

That it shall be the duty of all persons of lawful age to make and render a list or return, on or before the day prescribed by law, in such form and manner as may be prescribed by the Commissioner of Internal Revenue, to the assistant assessor of the district in which they reside, of the amount of their income, gains, and profits, as aforesaid; and all guardians and trustees, executors and administrators, or any person acting in any other fiduciary capacity, shall make and render a list or return, as aforesaid, to the assistant assessor of the district in which such person acting in a fiduciary capacity resides, of the amount of income, gains, and profits of any minor or person for whom they act; and the assistant assessor shall require every list or return to be verified by the oath or affirmation of the party rendering it, and may increase the amount of any list or return, if he has reason to believe that the same is understated; and in case any such person shall neglect or refuse to make and render such list or return, or shall render a false or fraudulent list or return, it shall be the duty of the assessor or the assistant assessor to make such list, according to the best information he can obtain, by the examination of such person, or his books or accounts, or any other evidence, and to add fifty per centum as a penalty to the amount of the tax due on such list in all cases of wilful neglect or refusal to make and render a list or return; and, in all cases of a false or fraudulent list or return having been rendered, to add one hundred per centum, as a penalty, to the amount of tax ascertained to be due, the tax and the additions thereto as penalty to be assessed and collected in the manner provided for in other cases of wilful neglect or refusal to render a list or return, or of rendering a false and fraudulent return: *Provided*, That any party, in his or her own behalf, or as such fiduciary, shall be permitted to declare, under oath or affirmation, the form and manner of which shall be prescribed by the Commissioner of Internal Revenue, that he or she, or his or her ward or beneficiary, was not possessed of an income of one thousand dollars, liable to be assessed according to the provisions of this act; or may declare that he or she has been assessed and paid an income tax elsewhere in the same year, under authority of the United States, upon his or her income, gains, and profits, as prescribed by law; and, if the assistant assessor shall be satisfied of the truth of the declaration, shall thereupon be exempt from income tax in the said district; or if the list or return of any party shall have been increased by the assistant assessor, such party may exhibit his books and accounts, and be permitted to prove and declare, under oath or affirmation, the amount of income liable to be assessed; but such oaths and evidence shall not be considered as conclusive of the facts, and no deductions claimed in such cases shall be made or allowed until approved by the assistant assessor. Any person feeling aggrieved by the decision of the assistant assessor in such cases, may appeal to the assessor of the district, and his decision thereon, unless reversed by the Commissioner of Internal Revenue, shall be final, and the form, time, and manner of proceedings shall be subject to rules and regulations to be prescribed by the Commissioner of Internal Revenue: *Provided further*, That no penalty shall be assessed upon any person for such neglect or refusal, or for making or rendering a false or fraudulent return, except after reasonable notice of the time and place of hearing, to be regulated by the Commissioner of Internal Revenue, so as to give the person charged an opportunity to be heard.

Section 119 as originally passed (13 Stat. at Large, 283).

And be it further enacted, That the duties on incomes herein imposed shall be levied on the first day of May, and be due and payable on or before the thirtieth day of June, in each year, until and including the year eighteen hundred and seventy, and no longer; and to any sum or sums annually due and unpaid for thirty days after the thirtieth of June, as aforesaid, and for ten days after demand thereof by the collector, there shall be levied in addition thereto the sum of ten per centum on the amount of duties unpaid, as a penalty, except from the estates of deceased and insolvent persons. And if any person liable to pay such duty shall neglect or refuse to pay the same, after such demand, the amount due shall be a lien in favor of the United States from the time it was due until paid, with the interest, penalties, and costs that may accrue in addition thereto, upon all the property and rights to property belonging to such person; and in default of the payment of said duty aforesaid, said lien may be enforced by distraint upon such property, rights to property, stocks, securities, and evidences of debt, by whomsoever holden; and for this purpose the collector, after demands duly given, as aforesaid, shall issue a warrant, in form and manner to be prescribed by the Commissioner of Internal Revenue, under the directions of the Secretary of the Treasury, and by virtue of such warrant there may be levied on such property, rights to property, stocks, securities, and evidences of debt, a further sum, to be fixed and stated in such warrant, over and above the said annual duty, interest, and penalty for non-payment, sufficient for the fees, costs, and expenses of such levy. And in all cases of sale, as aforesaid, the certificate of such sale by the collector shall vest in the purchaser all right, title, and interest of such delinquent in and to such property, whether the property be real or personal; and where the subject of sale shall be stocks, the certificate of said sale shall be lawful authority and notice to the proper corporation, company, or association, to record the same on the books or records, in the same manner as if transferred or assigned by the person or party holding the same, to issue new certificates of stock therefor in lieu of any original or prior certificates, which shall be void, whether canceled or not. And said certificates of sale of the collector, where the subject of sale shall be securities or other evidences of debt, shall be good and valid receipts to the person holding the same, as against any person holding, or claiming to hold, possession of such securities or other evidences of debt.

Section 119 as amended by act of March 3d, 1865, §1 (13 Stat. at Large, 481); by act of July 13th, 1866, §9 (14 ibid., 138); and by act of March 2d, 1867, §13 (14 ibid., 480).

That the taxes on incomes herein imposed shall be levied on the first day of March, and be due and payable on or before the thirtieth day of April, in each year, until and including the year eighteen hundred and seventy, and no longer; and to any sum or sums annually due and unpaid after the thirtieth of April, as aforesaid, and for ten days after notice and demand thereof by the collector, there shall be levied in addition thereto the sum of five per centum on the amount of taxes unpaid, and interest at the rate of one per centum per month upon said tax from the time the same became due, as a penalty, except from the estates of deceased, insane, or insolvent persons: *Provided*, That the tax on incomes for the year 1866 shall be levied on the day this act takes effect.

Section 120 as originally passed (13 Stat. at Large, 283).

And be it further enacted, That there shall be levied and collected a duty of five per centum on all dividends in scrip or money thereafter declared due, and whenever the same shall be payable, to stockholders, policy-holders, or depositors, as part of the earnings, income, or gains of any bank, trust company, savings institution, and of any fire, marine, life, inland insurance company, either stock or mutual, under whatever name or style known or called, in the United States or territories, whether specially incorporated or existing under general laws, and on all undistributed sums, or sums made or added during the year to their surplus or contingent funds; and said banks, trust companies, savings institutions, and insurance companies shall pay the said duty, and are hereby authorized to deduct and withhold from all payments made on account of any dividends or sums of money that may be due and payable as aforesaid, the said duty of five per centum. And a list or return shall be made and rendered to the assessor or assistant assessor in duplicate, and one of said lists or returns shall be transmitted, and the duty paid, to the Commissioner of Internal Revenue within thirty days after the time when any dividends or sums of money become due or payable as aforesaid; and said list or return shall contain a true and faithful account of the amount of duties as aforesaid; and there shall be annexed thereto a declaration of the president, cashier, or treasurer of the bank, trust company, savings institution, or insurance company, under oath or affirmation, in form and manner as may be prescribed by the Commissioner of Internal Revenue, that the same contains a true and faithful account of the duties as aforesaid. And for any default in the making or rendering of such list or return, with such declaration annexed, the bank, trust company, savings institution, or insurance company making such default, shall forfeit, as a penalty, the sum of one thousand dollars; and in case of any default in making or rendering said list or return, or of any default in the payment of the duty as required, or any part thereof, the assessment and collection of the duty and penalty shall be in accordance with the general provisions of law in other cases of neglect and refusal: *Provided*, That the duty upon the dividends of life insurance companies shall not be deemed due or to be collected until such dividends shall be payable by such companies, nor shall the portion of premiums returned by mutual life insurance companies to their policy-holders be considered as dividends or profits under this act.

Section 120 as amended by act of March 3d, 1865, (13 Stat. at Large, 481,) and by act of July 13th, 1866, §9 (14 ibid., 138).

That there shall be levied and collected a tax of five per centum on all dividends in scrip or money thereafter declared due, whereever and whenever the same shall be payable, to stockholders, policy-holders, or depositors or parties whatsoever, including non-residents, whether citizens or aliens, as part of the earnings, income, or gains of any bank, trust company, savings institution, and of any fire, marine, life, inland insurance company, either stock or mutual, under whatever name or style known or called, in the United States or territories, whether specially incorporated or existing under general laws, and on all undistributed sums, or sums made or added during the year to their surplus or contingent funds; and said banks, trust companies, savings institutions, and insurance companies shall pay the said tax, and are hereby authorized to deduct and withhold from all payments made on account of any dividends or sums of money that may be due and payable, as aforesaid, the said tax of five per centum. And a list or return shall be made and rendered to the assessor or assistant assessor on or before the tenth day of the month following that in which any dividends or sums of money become due or payable, as aforesaid; and said list or return shall contain a true and faithful account of the amount of taxes as aforesaid; and there shall be annexed thereto a declaration of the president, cashier, or treasurer of the bank, trust company, savings institution, or insurance company, under oath or affirmation, in form and manner as may be prescribed by the Commissioner of Internal Revenue, that the same contains a true and faithful account of the taxes as aforesaid. And for any default in the making or rendering of such list or return, with such declaration annexed, the bank, trust company, savings institution, or insurance company making such default shall forfeit, as a penalty, the sum of one thousand dollars; and in case of any default in making or rendering said list or return, or of any default in the payment of the tax as required, or any part thereof, the assessment and collection of the tax and penalty shall be in accordance with the general provisions of law in other cases of neglect and refusal: *Provided*, That the tax upon the dividends of life insurance companies shall not be deemed due until such dividends are payable; nor shall the portion of premiums returned by mutual life insurance companies to their policy-holders, nor the annual or semi-annual interest allowed or paid to the depositors in savings banks or savings institutions, be considered as dividends. (See act of March 10th, 1866, declaring meaning of parts of this section.)

Section 121 as originally passed (13 Stat. at Large, 284).

And be it further enacted, That any bank, legally authorized to issue notes as circulation, which shall neglect or omit to make dividends or additions to its surplus or contingent fund as often as once in six months, shall make a list or return in duplicate, under oath or affirmation of the president or cashier, to the assessor or assistant assessor of the district in which it is located, on the first day of January and July in each year, or within thirty days thereafter, of the amount of profits which have accrued or been earned and received by said bank during the six months next preceding said first days of January and July; and shall present one of said lists or returns and pay to the collector of the district a duty of five per centum on such profits; and in case of default to make such list or return and payment within the thirty days as aforesaid, shall be subject to the provisions of the foregoing section of this act: *Provided,* That when any dividend is made which includes any part of the surplus or contingent fund of any bank, trust company, savings institution, insurance or railroad company, which has been assessed and the duty paid thereon, the amount of duty so paid on that portion of the surplus or contingent fund may be deducted from the duty on such dividend. (No amendment.)

Section 122 as originally passed (13 Stat. at Large, 284).

And be it further enacted, That any railroad, canal, turnpike, canal navigation, or slackwater company indebted for any money for which bonds or other evidence of indebtedness have been issued, payable in one or more years after date, upon which interest is stipulated to be paid, or coupons representing the interest, or any such company that may have declared any dividend in scrip, or money due or payable to its stockholders, as part of the earnings, profits, income, or gains of such company, and all profits of such company carried to the account of any fund, or used for construction, shall be subject to and pay a duty of five per centum on the amount of all such interest or coupons, dividends or profits, whenever the same shall be payable; and said companies are hereby authorized to deduct and withhold from all payments, on account of any interest, or coupons and dividends due and payable as aforesaid, the duty of five per centum; and the payment of the amount of said duty so deducted from the interest, or coupons, or dividends, and certified by the president or treasurer of said company, shall discharge said company from that amount of the dividend, or interest, or coupon, on the bonds or other evidences of their indebtedness so held by any person or party whatever, except where said companies may have contracted otherwise. And a list or return shall be made and rendered to the assessor or assistant assessor in duplicate, and one of said lists or returns shall be transmitted, and the duty paid, to the Commissioner of Internal Revenue within thirty days after the time when said interest, coupons, or dividends become due and payable, and as often as every six months; and said list or return shall contain a true and faithful account of the amount of the duty, and there shall be annexed thereto a declaration of the president or treasurer of the company, under oath or affirmation, in form and manner as may be prescribed by the Commissioner of Internal Revenue, that the same contains a true and faithful account of said duty. And for any default in making or rendering such list or return, with the declaration annexed, or of the payment of the duty as aforesaid, the company making such default shall forfeit as a penalty the sum of one thousand dollars; and in case of any default in making or rendering said list or return, or of the payment of the duty, or any part thereof, as aforesaid, the assessment and collection of the duty and penalty shall be made according to the provisions of law in other cases of neglect or refusal.

Section 122 as amended by act of July 13th, 1866, §9 (14 Stat. at Large, 138).

That any railroad, canal, turnpike, canal navigation, or slackwater company, indebted for any money for which bonds or other evidence of indebtedness have been issued, payable in one or more years after date, upon which interest is stipulated to be paid, or coupons representing the interest, or any such company that may have declared any dividend in scrip or money due or payable to its stockholders, including non-residents, whether citizens or aliens, as part of the earnings, profits, income, or gains of such company, and all profits of such company carried to the account of any fund, or used for construction, shall be subject to and pay a tax of five per centum on the amount of all such interest or coupons, dividends or profits, whenever and wherever the same shall be payable, and to whatsoever party or person the same may be payable, including non-residents, whether citizens or aliens; and said companies are hereby authorized to deduct and withhold from all payments on account of any interest or coupons, and dividends, due and payable as aforesaid, the tax of five per centum; and the payment of the amount of said tax so deducted from the interest, or coupons, or dividends, and certified by the president or treasurer of said company, shall discharge said company from that amount of the dividend, or interest, or coupon on the bonds or other evidences of their indebtedness so held by any person or party whatever, except where said companies may have contracted otherwise. And a list or return shall be made and rendered to the assessor or assistant assessor on or before the tenth day of the month following that in which said interest, coupons, or dividends become due and payable, and as often as every six months; and said list or return shall contain a true and faithful account of the amount of tax, and there shall be annexed thereto a declaration of the president or treasurer of the company, under oath or affirmation, in form and manner as may be prescribed by the Commissioner of Internal Revenue, that the same contains a true and faithful account of said tax. And for any default in making or rendering such list or return, with the declaration annexed, or of the payment of the tax as aforesaid, the company making such default shall forfeit as a penalty the sum of one thousand dollars; and in case of any default in making or rendering said list or return, or of the payment of the tax or any part thereof, as aforesaid, the assessment and collection of the tax and penalty shall be made according to the provisions of law in other cases of neglect or refusal: *Provided*, That whenever any of the companies mentioned in this section shall be unable to pay the interest on their indebtedness, and shall in fact fail to pay such interest, in such cases the tax levied by this section shall not be paid to the United States until said company resume the payment of interest on their indebtedness. (See act of March 10th, 1866, declaring meaning of parts of this section.)

Section 123 as originally passed (13 Stat. at Large, 285).

And be it further enacted, That there shall be levied, collected, and paid on all salaries of officers; or payments for services to persons in the civil, military, naval, or other employment or service of the United States, including senators and representatives and delegates in Congress, when exceeding the rate of six hundred dollars per annum, a duty of five per centum on the excess above the said six hundred dollars; and it shall be the duty of all paymasters and all disbursing officers under the Government of the United States, or in the employ thereof, when making any payments to officers and persons as aforesaid, or upon settling and adjusting the accounts of such officers and persons, to deduct and withhold the aforesaid duty of five per centum, and shall, at the same time, make a certificate stating the name of the officer or person from whom such deduction was made, and the amount thereof, which shall be transmitted to the office of the Commissioner of Internal Revenue, and entered as part of the internal duties; and the pay-roll, receipts, or account of officers or persons paying such duty, as aforesaid, shall be made to exhibit the fact of such payment. And it shall be the duty of the several auditors of the Treasury Department, when auditing the accounts of any paymaster or disbursing officer, or when settling or adjusting the accounts of any such officer, to require evidence that the duties or taxes mentioned in this section have been deducted and paid over to the Commissioner of Internal Revenue: *Provided*, That payments of prize money shall be regarded as income from salaries, and the duty thereon shall be adjusted and collected in like manner.

Section 123 as amended by act of July 13th, 1866, §9, (14 Stat. at Large, 139,) and by act of March 2d, 1867, §13 (14 ibid., 480).

That there shall be levied, collected, and paid on all salaries of officers, or payments for services to persons in the civil, military, naval, or other employment or service of the United States, including senators, representatives, and delegates in Congress, when exceeding the rate of one thousand dollars per annum, a tax of five per centum on the excess above the said one thousand dollars; and it shall be the duty of all paymasters and all disbursing officers under the Government of the United States, or persons in the employ thereof, when making any payment to any officers or persons as aforesaid, whose compensation is determined by a fixed salary, or upon settling or adjusting the accounts of such officers or persons, to deduct and withhold the aforesaid tax of five per centum; and the pay-roll, receipts, or account of officers or persons paying such tax as aforesaid, shall be made to exhibit the fact of such payment. And it shall be the duty of the accounting officers of the Treasury Department, when auditing the accounts of any paymaster or disbursing officer, or any officer withholding his salary from moneys received by him, or when settling or adjusting the accounts of any such officer, to require evidence that the taxes mentioned in this section have been deducted and paid over to the Treasurer of the United States, or other officer authorized to receive the same: *Provided*, That payments of prize money shall be regarded as income from salaries, and the tax thereon shall be adjusted and collected in like manner: *Provided further*, That this section shall not apply to payments made to mechanics or laborers employed upon public works:

And provided further, That in case it should become necessary for showing the true receipts of the Government, under the operations of this section, upon the books of the Treasury Department, the requisite amount may be carried from unappropriated moneys in the treasury to the credit of said account; and this section shall take effect upon salary and compensation for the month of March, 1867.

Jany 22. 79. N. H. Swayne

THE ACT, APPROVED JULY 14th, 1870, ENTITLED AN ACT TO REDUCE INTERNAL TAXES, AND FOR OTHER PURPOSES.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That on and after the first day of May, eighteen hundred and seventy-one, the special taxes imposed by the seventy-ninth section of the act entitled "An act to provide internal revenue to support the Government, to pay interest on the public debt, and for other purposes," approved June thirty, eighteen hundred and sixty-four, as amended by section nine of the internal revenue act approved July thirteen, eighteen hundred and sixty-six, as amended by section two of the internal revenue act approved March two, eighteen hundred and sixty-seven, be, and the same are hereby, repealed; but this act shall not be held to repeal or in any way affect the special tax on brewers imposed by said section, or the special taxes imposed by the act approved July twenty, eighteen hundred and sixty-eight, entitled "An act imposing taxes on distilled spirits and tobacco, and for other purposes," or the acts amendatory thereof.

SEC. 2. *And be it further enacted*, That on and after the first day of October, eighteen hundred and seventy, the several taxes on sales imposed by the internal revenue laws now in force, saving and exempting such taxes on sales as are by existing law paid by stamps, and the taxes on sales of leaf tobacco, manufactured tobacco, snuff, segars, foreign and domestic distilled spirits, and wines, imposed by said act, approved July twenty, eighteen hundred and sixty-eight, and acts amendatory thereof, be, and the same are hereby, repealed.

SEC. 3. *And be it further enacted*, That on and after the first day of October, eighteen hundred and seventy, the taxes imposed by the internal revenue laws now in force, herein specified, be, and the same are hereby, repealed, namely: on articles in schedule A; the special tax on boats, barges, and flats; on legacies and successions; on passports; and on gross receipts.

SEC. 4. *And be it further enacted*, That on and after the first day of October, eighteen hundred and seventy, the stamp tax imposed in schedule B, on promissory notes for a less sum than one hundred dollars, and on receipts for any sum of money, or for the payment of any debt, and the stamp tax imposed in schedule C, on canned and preserved fish, be, and the same are hereby, repealed. And no stamp shall be required upon the transfer or assignment of a mortgage, where it or the instrument it secures has been once duly stamped. And the proprietor or proprietors of articles named in said schedule C, who shall furnish his or their own die or design for stamps to be used especially for his or their own proprietary articles shall be allowed the following commissions, namely: On amounts purchased at one time of not less than than fifty dollars nor more than five hundred dollars, five per centum; and on amounts over five hundred dollars, ten per centum on the whole amount purchased: *Provided*, That lucifer or friction matches, and cigar lights, and wax tapers, may be removed from the place of manufacture for export to a foreign country without payment of tax, or affixing stamps thereto, under such rules and regulations as the Commissioner of Internal Revenue may prescribe; and all provisions of existing laws inconsistent herewith are hereby repealed.

SEC. 5. *And be it further enacted*, That section one hundred and fifty-eight of the act entitled "An act to provide internal revenue to support the Government, to pay interest on the public debt, and for other purposes," approved June thirty, eighteen hundred and sixty-four, as amended by section nine of the internal revenue act, approved July thirteen, eighteen hundred and sixty-six, be, and is hereby, amended by striking out the words "fifty dollars," in the second proviso, and inserting in lieu thereof the following: "double the amount of tax remaining unpaid, but in no case less than five dollars;" also, by striking out the words "sixty-six" in the third proviso, and inserting in lieu thereof the words "seventy-one;" also, by striking out the words "sixty-seven" in the last proviso, and inserting in lieu thereof the words "seventy-two."

Sec. 6. *And be it further enacted,* That there shall be levied and collected annually, as hereinafter provided, for the years eighteen hundred and seventy and eighteen hundred and seventy-one, and no longer, a tax of two and one-half per centum upon the gains, profits, and income of every person residing in the United States, and of every citizen of the United States residing abroad, derived from any source whatever, whether within or without the United States, except as hereafter provided, and a like tax annually upon the gains, profits, and income derived from any business, trade, or profession carried on in the United States by any person residing without the United States, and not a citizen thereof, or from rents of real estate within the United States owned by any person residing without the United States, and not a citizen thereof.

Sec. 7. *And be it further enacted,* That in estimating the gains, profits, and income of any person, there shall be included all income derived from any kind of property, rents, interest received or accrued upon all notes, bonds, and mortgages, or other forms of indebtedness bearing interest, whether paid or not, if good and collectable, interest upon notes, bonds, or other securities of the United States; and the amount of all premium on gold and coupons; the gains, profits, and income of any business, profession, trade, employment, office, or vocation; including any amount received as salary or pay for services in the civil, military, naval, or other service of the United States, or as Senator, Representative or Delegate in Congress; except that portion thereof from which, under authority of acts of Congress previous hereto, a tax of five per centum shall have been withheld; the share of any person of the gains and profits, whether divided or not, of all companies or partnerships, but not including the amount received from any corporations whose officers, as authorized by law, withhold and pay as taxes a per centum of the dividends made, and of interest or coupons paid by such corporations; profits realized within the year from sales of real estate purchased within two years previous to the year for which income is estimated; the amount of sales of live stock, sugar, wool, butter, cheese, pork, beef, mutton, or other meats, hay and grain, fruits, vegetables, or other productions, being the growth or produce of the estate of such person, but not including any part thereof consumed directly by the family; and all other gains, profits, and income drawn from any source whatever, but not including the rental value of the homestead used or occupied by any person or by his family.

Sec. 8. *And be it further enacted*, That military or naval pensions allowed to any person under the laws of the United States, and the sum of two thousand dollars of the gains, profits, and income of any person, shall be exempt from said income tax, in the manner hereinafter provided. Only one deduction of two thousand dollars shall be made from the aggregate income of all the members of any family composed of one or both parents and one or more minor children, or of husband and wife; but when a wife has, by law, a separate income, beyond the control of her husband, and is living separate and apart from him, such deduction shall then be made from her income, gains, and profits; and guardians and trustees shall be allowed to make the deduction in favor of each ward or beneficiary, except that in case of two or more wards or beneficiaries comprised in one family, having joint property interest, only one deduction shall be made in their favor. For the purpose of allowing said deduction from the income of any religious or social community holding all the property and the income therefrom jointly and in common, each five of the persons composing such society, and any remaining fractional number of such persons less than five over such groups of five, shall be held to constitute a family, and a deduction of two thousand dollars shall be allowed for each of said families. Any taxes on the incomes, gains, and profits of such societies, now due and unpaid, shall be assessed and collected according to this provision, except that the deduction shall be only one thousand dollars for any year prior to eighteen hundred and seventy.

SEC. 9. *And be it further enacted*, That in addition to the exemptions provided in the preceding section, there shall be deducted from the gains, profits, and income of any person all national, State, county, and municipal taxes paid by him within the year, whether such person be owner, tenant, or mortgager; all his losses actually sustained during the year, arising from fires, floods, shipwreck, or incurred in trade, and debts ascertained to be worthless, but excluding all estimated depreciation of values; the amount of interest paid during the year, and the amount paid for rent or labor to cultivate land, or to conduct any other business from which income is derived; the amount paid for the rent of the house or premises occupied as a residence for himself or his family, and the amount paid out for usual and ordinary repairs. No deduction shall be made for any amount paid out for new buildings, permanent improvements, or betterments made to increase the value of any property or estate.

SEC. 10. *And be it further enacted*, That the tax hereinbefore provided shall be assessed upon the gains, profits, and income for the year ending on the thirty-first day of December next preceding the time for levying and collecting said tax, and shall be levied on the first day of March, eighteen hundred and seventy-one and eighteen hundred and seventy-two, and be due and payable on or before the thirtieth day of April in each of said years. And in addition to any sum annually due and unpaid after the thirtieth day of April, and for ten days after notice and demand thereof by the collector, there shall be levied and collected, as a penalty, the sum of five per centum on the amount unpaid, and interest on said amount at the rate of one per centum per month from the time the same became due, except from the estates of deceased, insane, or insolvent persons.

SEC. 11. *And be it further enacted*, That it shall be the duty of every person of lawful age, whose gross income during the preceding year exceeded two thousand dollars, to make and render a return on or before the day designated by law, to the assistant assessor of the district in which he resides of the gross amount of his income, gains, and profits as aforesaid; but not including the amount received from any corporation whose officers, as authorized by law, withhold and pay as taxes a per centum of the dividends made and of the interest or coupons paid by such corporation, nor that portion of the salary or pay received for services in the civil, military, naval, or other service of the United States, or as Senator, Representative, or Delegate in Congress, from which tax has been deducted, nor the wages of minor children not received; and every guardian and trustee, executor or administrator, and any person acting in any other fiduciary capacity, or as a resident agent for, or co-partner of, any non-resident alien, deriving income, gains, and profits from any business, trade, or profession carried on in the United States, or from rents of real estate situated therein, shall make and render a return as aforesaid to the assistant assessor of the district in which he resides of the amount of income, gains, and profits of any minor or person for whom he acts. The assistant assessor shall require every such return to be verified by the oath of the party rendering it, and may increase the amount of any return, after notice to such party, if he has reason to believe that the same is understated. In case any person having a gross income as above, of two thousand dollars or more, shall neglect or refuse to make and render such return, or shall render a false or fraudulent return, the assessor or the assistant assessor shall make such return, according to the best information he can obtain by the examination of the said person, or of his books or accounts, or by any other evidence, and shall add, as a penalty, to the amount of the tax due thereon, fifty per centum in all cases of wilful neglect or refusal to make and render a return, and one hundred per centum in all cases of false or fraudulent return having been rendered. The tax and the addition thereto as penalty shall be assessed and collected in the manner provided for in case of wilful neglect or refusal to render a return, or of rendering a false or fraudulent return. But no penalty shall be assessed upon any person for such neglect or refusal, or for making or rendering a false or fraudulent return, except after reasonable notice of the time and place of hearing, to be regulated by the Commissioner of Internal Revenue, so as to give the person charged an opportunity to be heard: *Provided*, That no collector, deputy collector, assessor, or assistant assessor shall permit to be published in any manner such income returns, or any part thereof, except such general statistics, not specifying the names of individuals or firms, as he may make public, under such rules and regulations as the Commissioner of Internal Revenue shall prescribe.

SEC. 12. *And be it further enacted,* That when the return of any person is increased by the assistant assessor, such person may exhibit his books and accounts and be permitted to prove and declare, under oath, the amount of income liable to be assessed; but such oath and evidence shall not be conclusive of the facts, and no deductions claimed in such cases shall be allowed until approved by the assistant assessor. Any person may appeal from the decision of the assistant assessor, in such cases, to the assessor of the district, and his decision thereon, unless reversed by the Commissioner of Internal Revenue, shall be final. The form, time, and manner of proceedings shall be subject to regulations to be prescribed by the Commissioner of Internal Revenue.

SEC. 13. *And be it further enacted,* That any person, in his own behalf, or as such fiduciary or agent, shall be permitted to declare, under oath, that he, or his ward, beneficiary, or principal, was not possessed of an income of two thousand dollars, liable to be assessed according to the provisions of this act; or may declare that an income tax has been assessed and paid elsewhere in the same year, under authority of the United States, upon his income, gains, and profits, or those of his ward, beneficiary, or principal, as required by law; and if the assistant assessor shall be satisfied of the truth of the declaration, such person shall thereupon be exempt from income tax in the said district.

SEC. 14. *And be it further enacted,* That consuls of foreign governments who are not citizens of the United States shall be exempt from any income tax imposed by this act which may be derived from their official emoluments, or from property in foreign countries: *Provided,* That the governments which such consuls may represent shall extend similar exemption to consuls of the United States.

SEC. 15. *And be it further enacted,* That there shall be levied and collected for and during the year eighteen hundred and seventy-one a tax of two and one-half per centum on the amount of all interest or coupons paid on bonds or other evidences of debt issued and payable in one or more years after date, by any of the corporations in this section hereinafter enumerated, and on the amount of all dividends of earnings, income, or gains hereafter declared, by any bank, trust company, savings institution, insurance company, railroad company, canal company, turnpike company, canal navigation company, and slack-water company, whenever and wherever the same shall be payable, and to whatsoever person the same may be due, including nonresidents, whether citizens or aliens, and on all undivided profits of any such corporation which shall have accrued and been earned and added to any surplus, contingent, or other fund, and every such corporation having paid the tax as aforesaid, is hereby authorized to deduct and withhold from any payment on account of interest, coupons, and dividends an amount equal to the tax of two and one-half per centum on the same; and the payment to the United States, as provided by law, of the amount of tax so deducted from the interest, coupons, and dividends aforesaid, shall discharge the corporation from any liability for that amount of said interest, coupons, or dividends, claimed as due to any person, except in cases where said corporations have provided otherwise by an express contract: *Provided,* That the tax upon the dividends of insurance companies shall not be deemed due until such dividends are payable, either in money or otherwise; and that the money returned by mutual insurance companies to their policy-holders, and the annual or semi-annual interest allowed or paid to the depositors in savings banks or saving institutions, shall not be considered as dividends; and that when any dividend is made, or interest as aforesaid is paid, which includes any part of the surplus or contingent fund of any corporation which has been assessed and the tax paid thereon, or which includes any part of the dividends, interest, or coupons received from other corporations whose officers are authorized by law to withhold a per centum on the same, the amount of tax so paid on that portion of the surplus or contingent fund, and the amount of tax which has been withheld and paid on dividends, interest, or coupons so received, may be deducted from the tax on such dividend or interest.

SEC. 16. *And be it further enacted*, That every person having the care or management of any corporation liable to be taxed under the last preceding section, shall make and render to the assessor or assistant assessor of the district in which such person has his office for conducting the business of such corporation, on or before the tenth day of the month following that in which any dividends or sums of money become due or payable as aforesaid, a true and complete return, in such form as the Commissioner of Internal Revenue may prescribe, of the amount of income and profits and of taxes as aforesaid; and there shall be annexed thereto a declaration of the president, cashier, or treasurer of the corporation, under oath, that the same contains a true and complete account of the income and profits and of taxes as aforesaid. And for any default in the making or rendering of such return, with such declaration annexed, the corporation so in default shall forfeit, as a penalty, the sum of one thousand dollars; and in case of any default in making or rendering said return, or of any default in the payment of the tax as required, or of any part thereof, the assessment and collection of the tax and penalty shall be in accordance with the general provisions of law in other cases of neglect and refusal.

SEC. 17. *And be it further enacted*, That sections one hundred and twenty, one hundred and twenty-one, one hundred and twenty-two, and one hundred and twenty-three of the act of June thirty, eighteen hundred and sixty-four, entitled "An act to provide internal revenue to support the Government, to pay interest on the public debt, and for other purposes," as amended by the act of July thirteen, eighteen hundred and sixty-six, and the act of March two, eighteen hundred and sixty-seven, shall be construed to impose the taxes therein mentioned to the first day of August, eighteen hundred and seventy, but after that date no further taxes shall be levied or assessed under said sections; and all acts and parts of acts relating to the taxes herein repealed, and *that* all the provisions of said acts, shall continue in full force for levying and collecting all taxes properly assessed or liable to be assessed, or accruing under the provisions of former acts, or drawbacks, the right to which has already accrued or which may hereafter accrue under said acts, and for maintaining and continuing liens, fines, penalties, and forfeitures incurred under and by virtue thereof. And this act shall not be construed to affect any act done, right accrued, or penalty incurred under former acts, but every such right is hereby saved. And for carrying out and completing all proceedings which have been already commenced or that may be commenced to enforce such fines, penalties, and forfeitures, or criminal proceedings under said acts, and for the punishment of crimes of which any party shall be or has been found guilty.

SEC. 18. *And be it further enacted*, That the President is hereby authorized to annex to, and unite with each other, two or more adjoining collection districts, whenever in his opinion it will reduce the expenses of collecting the internal revenue, without impairing the efficiency of the service; and thereupon shall retain but one collector and one assessor for such enlarged district. And the President is also authorized to consolidate in like manner, at his discretion, any two or more adjoining supervisors' districts, and to retain or appoint one supervisor for such consolidated district.

SEC. 19. *And be it further enacted*, That as soon as practicable after the passage of this act the number of assistant assessors employed shall be permanently reduced by the discharge of all officers of that class who are assigned specially to the assessment of any taxes which shall have been abolished by law; and the Commissioner of Internal Revenue shall be required further to reduce the number of assistant assessors in proportion to any reduction of the service of assessment which has been made, or may hereafter be made, by the repeal of any portion of the internal taxes.

SEC. 20. *And be it further enacted*, That section sixty-seven of an act approved July thirteen, eighteen hundred and sixty-six, entitled "An act to reduce internal taxation, and to amend an act entitled 'An act to provide internal revenue to support the Government, to pay interest on the public debt, and for other purposes,' approved June thirty, eighteen hundred and sixty-four," be amended by inserting after the words "that in any case civil or criminal," the words "at law or in equity;" also, by inserting after the words "if the suit were commenced in the court below by summons," the words following: "subpœna, petition, or by any other form of action except as hereinafter provided;" also, by inserting after the words "or if it were commenced by capias," the words following: "or by any similar form of proceeding by which a personal arrest is ordered."

SEC. 25. *And be it further enacted*, That section fifteen of the act approved July fourteen, eighteen hundred and sixty-two, entitled "An act increasing, temporarily, the duties on imports, and for other purposes," and section four of the act in amendment thereof, approved March three, eighteen hundred and sixty-five, be, and the same are hereby, so amended, that no ship, vessel, steamer, boat, barge, or flat belonging to any citizen of the United States, trading from one port or point within the United States, to another port or point within the United States, or employed in the bank, whale, or other fisheries, shall hereafter be subject to the tonnage tax or duty provided for in said acts; and the proviso in section one hundred and three of the "Act to provide internal revenue to support the Government and to pay the interest on the public debt, and for other purposes," approved June thirty, eighteen hundred and sixty-four, requiring an annual special tax to be paid by boats, barges, and flats, is hereby repealed.

SEC. 27. *And be it further enacted*, That all provisions of existing laws whereby any tax or duty is laid upon bequests or devises, or transfers by deed, grant, or gift, made or intended to take effect after the death of the grantor, cf any real or personal property, in trust or otherwise, for public uses as a literary, educational, or charitable character, or upon any real or personal estate which may become subject to any trust as aforesaid under any past or future disposition, which, if made in favor of an individual, would confer on him a succession, be, and the same are hereby, repealed, and no taxes heretofore levied thereunder, but not paid, shall be collected.

SEC. 28. *And be it further enacted*, That in all cases where tobacco is required to be put up in wooden packages, as provided by section sixty-two of an act entitled "An act imposing taxes on distilled spirits and tobacco, and for other purposes," approved July twenty, eighteen hundred and sixty-eight, it shall be lawful for the Commissioner of Internal Revenue to allow the same to be put up in metallic packages: *Provided*, That they shall be so constructed with such corrugations for receiving and protecting the revenue stamps as the Commissioner may approve.

Sections 21, 22, 23, 24, 26, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, relate to the duties on imports.

Approved July 14, 1870.